DOCUMENT RESUME

ED 243 222 EA 016 718

AUTHOR Guerrier, Charles E.
TITLE Title IX and the Achievement of Equal Educational Opportunity: A Legal Handbook.
INSTITUTION Council of Chief State School Officers, Washington, D.C.
SPONS AGENCY Women's Educational Equity Act Program (ED), Washington, DC.
PUB DATE [80]
CONTRACT 300-76-0456; 300-79-0728
NOTE 110p.; Prepared by the Resource Center on Sex Equity.
PUB TYPE Guides - Non-Classroom Use (055) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC05 Plus Postage.
DESCRIPTORS Affirmative Action; Compliance (Legal); *Court Litigation; Educational Discrimination; *Educational Opportunities; *Equal Education; Equal Opportunities (Jobs); Federal Courts; *Federal Legislation; Federal Regulation; Females; Justice; Legal Responsibility; Nondiscriminatory Education; Sex Bias; *Sex Discrimination; *Sex Fairness; Sex Role
IDENTIFIERS *Title IX Education Amendments 1972

ABSTRACT

Designed to provide an introduction to major issues, controversies, and case law related to Title IX of the Education Amendments of 1972, this handbook is intended to promote more informed interaction between administrators and the attorneys who represent and advise them regarding sex discrimination issues. Following a brief explanation of the need for Title IX in section I, section II discusses the theory and reality of permissible and impermissible discrimination and offers a capsule history of judicial opinions in cases involving sex-based distinctions. In section III, the author discusses the statute's enactment and amendment processes and provides a section-by-section analysis. Beginning with an exposition of the implementing regulation's adoption process, authoritativeness, scope, and interpretation, section IV offers a detailed analysis that constitutes the bulk of the document. In addition to its introductory section, this analysis contains sections on (1) coverage; (2) prohibitions of discrimination on the basis of sex in admission and recruitment, education programs and activities, and employment in education programs and activities; and (3) interim procedures. Appendix A provides a copy of the Title IX implementing regulation republished in 1980 as C.F.R. Part 106. Appendix B summarizes the United States system of legal references and citations. (JBM)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

000 040
Prod 0002

Dept (info)
Sue
add to RAS

ED243222

TITLE IX AND THE ACHIEVEMENT OF EQUAL EDUCATIONAL OPPORTUNITY: A LEGAL HANDBOOK

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☒ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

Charles E. Guerrier

EA 016 718

Resource Center on Sex Equity
Council of Chief State School Officers
Washington, D.C.

DISCRIMINATION PROHIBITED—No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance, or be so treated on the basis of sex under most education programs or activities receiving Federal assistance.

TITLE IX AND THE ACHIEVEMENT OF EQUAL EDUCATIONAL OPPORTUNITY: A LEGAL HANDBOOK

Written by
CHARLES E. GUERRIER

Executive Director and Staff Attorney
Women's Law Fund
Cleveland, Ohio

This manual was designed and prepared primarily to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that through its distribution neither the author nor the publisher is engaged in rendering legal services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

Prepared by the
RESOURCE CENTER ON SEX EQUITY
COUNCIL OF CHIEF STATE SCHOOL OFFICERS
Washington, D.C.

Prepared under contract 300–76–0456 for the Women's Program Staff, U.S. Office of Education, Department of Health, Education, and Welfare. Reproduced under contract 300–79–0728 for the Women's Educational Equity Act Program, U.S. Department of Education.

PREFACE

Title IX and the Achievement of Equal Educational Opportunity: A Legal Handbook was developed by the Council of Chief State School Officers' Resource Center on Sex Equity under contract 300-76-0456 with the Women's Educational Equity Act Program, U.S. Office of Education, Department of Health, Education, and Welfare. It is published under contract 300-79-0728, also with the Women's Educational Equity Act Program, U.S. Department of Education.

The Resource Center extends warm thanks and gratitude to Charles E. Guerrier, Director of the Women's Law Fund, Cleveland, Ohio, for his preparation of this handbook and his continuing support of and contributions to Resource Center projects. The Women's Law Fund, under support from the Ford Foundation, provides national leadership in legal efforts to attain sex equity in education.

The assistance and advice of M. Patricia Goins, Project Monitor, Carolyn Joyner, Project Monitor, and Dr. Leslie Wolfe, Director, Women's Educational Equity Act Program, U.S. Department of Education, are also gratefully acknowledged.

SEPTEMBER 1979

TABLE OF CONTENTS

Page

PREFACE 2
TABLE OF CASES 5
AN INTRODUCTION TO THE HANDBOOK 9

I. THE NEED 11

II. THE CONCEPT OF DISCRIMINATION 13

- A. Permissible and Impermissible Discrimination 13
  - 1. The Theory 13
  - 2. The Reality 14
- B. Sex Discrimination: A Unique Judicial Approach 17

III. THE STATUTE 19

- A. The Enactment Process 19
- B. The Amendment Process 19
- C. Section-By-Section Analysis 21
  - 20 U.S.C. § 1681, As Amended 21
  - 20 U.S.C. § 1682 25
  - 20 U.S.C. § 1683 27
  - 20 U.S.C. § 1684 28
  - 20 U.S.C. § 1685 28
  - Pub. L. 93-318, Title IX, Section 906 29
  - 20 U.S.C. § 1686 29

IV. THE IMPLEMENTING REGULATION 31

- A. The Adoption Process 31
- B. The Authoritativeness of The Regulation 32
- C. Scope Of The Regulation 33
- D. Concerning The Reading Of Regulations 33
- E. Section-By-Section Analysis 35
  - Subpart A—Introduction 35
    - § 86.1 Purpose and Effective Date 35
    - § 86.2 Definitions 36
    - § 86.3 Remedial And Affirmative Action And Self-Evaluation 39
    - § 86.4 Assurance Required 42
    - § 86.5 Transfers Of Property 43
    - § 86.6 Effect Of Other Requirements 44
    - § 86.7 Effect Of Employment Opportunities 45
    - § 86.8 Designation of Responsibile Employee And Adoption of Grievance Procedures 45
    - § 86.9 Dissemination Of Policy 46
  - Subpart B—Coverage 47
    - § 86.11 Application 47
    - § 86.12 Educational Institutions Controlled By Religious Organizations 48
    - § 86.13 Military And Merchant Marine Educational Institutions 49
    - § 86.14 Membership Practices Of Certain Organizations 49
    - § 86.15 Admissions 50
    - § 86.16 Educational Institutions Eligible To Submit Transition Plans 51
    - § 86.17 Transition Plans 51
  - Subpart C—Discrimination On The Basis of Sex In Admission And Recruitment Prohibited 53
    - § 86.21 Admission 53
    - § 86.22 Preference In Admission 55
    - § 86.23 Recruitment 56
  - Subpart D—Discrimination On The Basis of Sex In Education Programs And Activities Prohibited 57
    - § 86.31 Education Programs And Activities 57
    - § 86.32 Housing 59
    - § 86.33 Comparable Facilities 61
    - § 86.34 Access To Course Offerings 63
    - § 86.35 Access To Schools Operated By L.E.A.'s 65

§ 86.36 Counseling And Use of Appraisal And Counseling Materials 66
§ 86.37 Financial Assistance 67
§ 86.38 Employment Assistance To Students 69
§ 86.39 Health And Insurance Benefits And Services 70
§ 86.40 Marital Or Parental Status 71
§ 86.41 Athletics 73
§ 86.42 Textbooks And Curricular Material 79
Subpart E—Discrimination On The Basis Of Sex In Employment In Education Programs And Activities Prohibited 81
§ 86.51 Employment 84
§ 86.52 Employment Criteria 86
§ 86.53 Recruitment 87
§ 86.54 Compensation 88
§ 86.55 Job Classification And Structure 89
§ 86.56 Fringe Benefits 90
§ 86.57 Marital Or Parental Status 92
§ 86.58 Effect Of State Or Local Law Or Other Regulations 94
§ 86.59 Advertising 96
§ 86.60 Pre-employment Inquiries 96
§ 86.61 Sex As A Bona-fide Occupational Qualification 97
Subpart F—Interim Procedures 98
§ 86.71 Interim Procedures 98

APPENDIXES

A. 45 C.F.R., Part 106[1]—Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance 99
B. The System of Legal References and Citations 113

---

[1] Since the preparation of this *Handbook*, the regulation to implement Title IX has been republished as 45 C.F.R., Part 106. § 86.1 in the original regulation corresponds to § 106.1 in the republished regulation which now comprises Appendix A.

TABLE OF CASES

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) 26, 27

Afro American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974) 80

Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346 (D. Ala. 1967) 32

Albermarle v. Moody, 422 U.S. 405, 95 S.Ct. 2362 (1975) 86

Alexander v. Gardner-Denver, 415 U.S. 36, 94 S. Ct. 1011 (1974) 44

Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975) *cert. dismissed as improvidently granted,* ___ U.S. ___, 96 S. Ct. 1752 (1976) 92

Atchison, Topeka & S.F.R.R. v. Mathews, 174 U.S. 96, 19 S. Ct. 609 (1899) 14

Bakke v. Regents of the University of California, 132 Cal. Rptr. 680, 553 Pac.2d 1152 (1976), *aff'd in part, rev'd in part sub nom.* Regents of The University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978) 39, 40, 41, 56

Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1972) 91

Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (9th Cir. 1974) 22, 23, 53, 57

Blackshear Residents Organization v. Housing Authority of City of Austin, 347 F.Supp. 1138 (D. Tex. 1972) 32

Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969) 25, 26, 27

Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) *aff'd sub nom.* Bob Jones University v. Roudebush 529 F.2d 514 (4th Cir. 1975) 22, 26, 27, 37

Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954) 17

Bond v. Virginia Polytechnic Institute and State University, 381 F.Supp. 1023 (W.D. Va. 1974) 70

Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967) 22

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 89

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). 17

Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) 23, 53

Brenden v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973) 37, 47, 73, 74

Brennan v. Goose Creek Consolidated Independent School District, ___ F.Supp. ___, 21 WH Cases 25 (S.D. Tex. 1973) aff'd 519 F.2d 53 (5th Cir. 1975) 88

Brennan v. Prince William Hospital Corp., 503 F.2d 282 (4th Cir. 1974) *cert. denied* 420 U.S. 972, 95 S.Ct. 1392 (1975). 88

Brennan v. Woodbridge School District, ___ F.Supp. ___, 8 EPD ¶9640 (D. Del. 1974) 88

Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954) 11, 57

Bucha v. Illinois High School Association, 351 F.Supp. 69 (N.D. Ill. 1972) 74

Buckley v. Coyle Public School System, 476 F.2d 92 (10th Cir. 1973) 93

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856 (1961) 14, 37

Bynes v. Toll, 512 F.2d 252 (2nd Cir. 1975) 59

Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021 (1977) 14

California v. LaRue, 409 U.S. 109, 93 S.Ct. 390 (1972) 34

Cannon v. University of Chicago, ___ U.S. ___, 99 S.Ct. 1946 (1979) *reversing* 559 F.2d 1063 (7th Cir. 1977) 98

Cape v. Tennessee Secondary School Athletic Association, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd* 563 F.2d 793 (6th Cir. 1977) 47, 76, 77, 78

Carnes v. Tennessee Secondary School Athletic Association, 415 F.Supp. 569 (E. D. Tenn. 1976) 72

City of Los Angeles v. Manhart, ___ U.S. ___, 98 S.Ct. 1370 (1978) *affirming* 553 F.2d 581 (9th Cir. 1976) 90, 91

Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791 (1974) *affirming* 465 F.2d 1184 (6th Cir. 1972) 93

Clinton v. Nagy, 411 F.Supp. 1396 (N.D. Ohio 1974) 74, 76

Commonwealth of Pennsylvania v. Pennsylvania Interscholastic Athletic Association, No. 1526 C.D. 1973 (Pa. Sup. Ct., March 19, 1975) 75

Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971), *cert. denied* 404 U.S. 854, 92 S.Ct. 98 (1971) 34, 82

Cordova v. Chonke, 315 F.Supp. 953 (N.D. Ohio 1969)	57
Corn Products Co. International, Inc. & Atomic Workers, Local 7-662, Lab. Arb. ¶843g (1970)	97
Cummins v. Parker Seal Company, 516 F.2d 544 (6th Cir. 1975), *judgment aff'd by an equally divided court*, 429 U.S. 65, 97 S.Ct. 342 (1976)	33
Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451 (1976)	13, 14, 18, 41, 59
Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1970)	13
Davis v. Meek, 344 F.Supp. 298 (N.D. Ohio 1972)	57, 71, 72
DeFunis v. Odegaard, 416 U.S. 320, 94 S.Ct. 1704 (1974)	38
Diamond Roofing v. Occupational Safety & Health Review Commission, 528 F.2d 645 (5th Cir. 1976)	33, 34
Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) *cert. denied* 404 U.S. 950, 92 S.Ct. 275 (1971)	84, 85
DiSalvo v. Chamber of Commerce of Greater Kansas City, 416 F.Supp. 844 (D. Mo. 1976)	88
Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720 (1977)	86, 97
Dove v. Parham, 282 F.2d 256 (5th Cir. 1960)	64
Edwards v. Schlesinger, 377 F.Supp. 1091 (D.C. 1974), rev'd 509 F.2d 508 (D.C. Cir. 1974)	49
Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375 (1976)	33
Espinoza v. Farah Manufacturing Company, Inc., 414 U.S. 86, 94 S.Ct. 334 (1973)	33
Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486 (1966)	37
Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367 (1960)	14
Florida v. Mathews, 526 F.2d 319 (5th Cir. 1976)	33
Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975)	74
Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973)	18
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560 (1920)	13
Gardner v. State of Alabama, Department of Pensions and Security, 385 F.2d 804 (5th Cir. 1967)	42, 57, 58
Garneau v. Raytheon Co., 323 F.Supp. 391 (D. Mass. 1971)	88
Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485 (1974)	93
General Electric v. Gilbert, 429 U.S. 125, 97 S.Ct. 401 (1977)	90, 93, 94
Gilmore v. City of Montgomery, Alabama, 417 U.S. 556, 94 S.Ct. 2416 (1974)	37
Gilpin v. Kansas State High School Activities Association, 377 F.Supp. 1233 (D. Kan. 1973)	74, 76
Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198 (1948)	17
Green v. Waterford Board of Education, 473 F.2d 629 (2nd Cir. 1973)	93
Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971)	15, 53, 86
Grubbs v. Butz, 514 F.2d 1323 (D.C. Cir. 1975)	33
Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D. Pa. 1976) *aff'd* 556 F.2d 184 (3rd Cir. 1977)	28
Hardy v. Leonard, 377 F.Supp. 831 (D. Calif. 1974)	27
Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975)	85
Harrington v. Vandalia-Butler Board of Education, 418 F.Supp. 603 (S.D. Ohio 1976), *reversed on other grounds* 585 F.2d 192 (6th Cir. 1978) *cert. denied* ___ U.S. ___ 99 S.Ct. 2053 (1979)	44, 85
Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375 (1943)	17
Hodgson v. Corning Glass Works, 417 U.S. 188, 94 S.Ct. 2223 (1974)	88
Hollon v. Mathis Independent School District, 358 F.Supp. 1269 (S.D. Tex. 1973)	72
Hoover v. Meiklejohn, 430 F.Supp. 164 (D. Colo. 1977)	75, 76
Houston v. Prosser, 361 F.Supp. 295 (N.D. Ga. 1973)	72
Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159 (1961)	17
International Union of Electrical Workers v. Robbins & Meyers, 429 U.S. 229, 97 S.Ct. 441 (1976)	19, 44
Isleboro School Committee v. Califano, 593 F.2d 424 (1st Cir. 1979)	82
Jackson v. Metropolitan Edison Company, 419 U.S. 345, 95 S.Ct. 449 (1974)	14
Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977) *cert. denied*, ___ U.S. ___, 97 S.Ct. 2180 (1977)	93
Johnson v. Jackson Parish School Board, 423 F.2d 1055 (5th Cir. 1969)	64
Johnson v. University of Pittsburgh, 359 F.Supp. 1002 (W.D. Pa. 1973)	87
Johnson's Professional Nursing Home v. Weinberger, 490 F.2d 841 (5th Cir. 1974)	33

Jones v. Oklahoma Secondary School Activities Association, 453 F.Supp. 150 (W. D. Okla. 1977) 78
Junior College District of St. Louis v. Califano, ____ F.2d ____, 19 FEP Cases 801 (8th Cir. 1979) 82
Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734 (1974) 17, 66
Kaplowitz v. University of Chicago, 387 F.Supp. 42 (N.D. Ill. 1974) 69
Katz v. School Dist. of Clayton, Mo., ____ F.2d ____, 14 EPD ¶7650 (8th Cir. 1977) 88
Kirstein v. Rector and Visitors of University of Virginia, 390 F.Supp. 184 (D. Va. 1970) 23, 24
Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3rd Cir. 1973) 89
Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193 (1944) 14, 17
Laffey v. Northwest Airlines, Inc., 366 F.Supp. 763 (D.D.C. 1973) *aff'd* 13 FEP Cases 1068 (D.C. Cir. 1976) *cert. denied* ____ U.S. ____ 16 FEP Cases 872 (1939) 89
Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872 (1939) 15
Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786 (1974) 15, 22, 32, 33
Lee v. Macon County Board of Education, 270 F.Supp. 859 (D. Ala. 1967) 32
Lemon v. Bossier Parish School Board, 444 F.2d 1400 (5th Cir. 1971) 63, 64
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337 (1910) 14
Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539 (1905) 17
Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) 97
Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973) 44, 95
Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755 (1976) 14, 15
McArthur v. Southern Airways, Inc., 404 F.Supp. 508 (D. Ga. 1975) 85
McCarthy v. Burkholder, 448 F.Supp. 41, (D. Kan. 1978) 82
McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975) 64
Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962) 56
Mollere v. Southeastern Louisiana College, 304 F.Supp. 826 (E.D. La. 1969) 59
Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972) 14
Morris v. Michigan State Board of Education, 472 F.2d 1207 (6th Cir. 1973) 74, 76
Mourning v. Family Publications Service, 411 U.S. 356, 93 S.Ct. 1652 (1973) 33, 34
Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324 (1908) 17
Muscare v. O'Malley, ____ F.Supp. ____, No. 76-C-3729 (N.D. Ill. 1976) 74, 76
NAACP, Western Region v. Brennan, 360 F.Supp. 1006 (D.D.C. 1973) 82
Nashville Gas Co. v. Satty, 434 U.S. 136, 98 S.Ct. 347 (1977) 93, 94
Nance v. Union Carbide Corp., Consumer Products Division, 397 F.Supp. 436 (D.N.C. 1975) 84
Ordway v. Hargraves, 323 F.Supp. 1155 (D. Mass. 1971) 71
Palmer v. General Mills, Inc., 513 F.2d 1040 (6th Cir. 1975) 89
Palmer v. Thompson, 403 U.S. 217, 21 S.Ct. 1940 (1971) 15
Perry v. Granada Municipal Separate School District, 300 F.Supp. 748 (N.D. Miss. 1969) 71
Personnel Administrator of Massachusetts v. Feeney, ____ U.S. ____, 99 S.Ct. 2282 (1979) 55, 84, 85
Piascik v. Cleveland Museum of Art, 426 F.Supp. 779 (N.D. Ohio 1976) 22, 35, 37, 82, 84
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 379, 93 S.Ct. 2553 (1973) 96
Pond v. Braniff Airways, Inc., 500 F.2d 161, (5th Cir. 1974) 84
Poynter v. Dreydahl, 359 F.Supp. 1137 (W.D. Mich. 1972) 59
Pratz v. Louisiana Polytechnic Institute, 316 F.Supp. 872 (W.D. La. 1970) *aff'd* 401 U.S. 1004, 91 S.Ct. 1252 (1971) 59
Prostrollo v. University of South Dakota, 507 F.2d 775 (8th Cir. 1974) 59
Raney v. Board of Education of Gould School District, 381 F.2d 252, (8th Cir. 1967) *rev'd on other grounds* 391 U.S. 443, 88 S.Ct. 1697 (1968) 32
Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 89 S.Ct. 1794 (1969) 33
Reed v. Nebraska School Activities Association, 341 F.Supp. 258 (D. Neb. 1972) 73, 76
Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971) 17, 18, 19
Reilly v. Robertson, 360 N.E. 2d 171, 13 EPD ¶11,626 (Indiana Sup. Ct. 1977) *cert. denied* 98 S.Ct. 73 (1977) 91

__ Ridinger v. General Motors Corp., 325 F.Supp. 1089 (N.D. Ohio 1971) *rev'd on other grounds* 474 F.2d 949 (6th Cir. 1972) 89
Robinson v. Board of Regents of Eastern Kentucky University, 475 F.2d 707 (6th Cir. 1973) *cert. denied* 416 U.S. 982, 94 S.Ct. 2382 (1974) 59
Romans v. Crenshaw, 354 F.Supp. 868 (S.D. Tex. 1972) 72
Romeo Community Schools v. United States Department of Health, Education and Welfare, 438 F.Supp. 1021 (E.D. Mich. 1977) *aff'd* ____ F.2d ____ , 19 FEP Cases 1720 (6th Cir. 1979) 19, 22, 33, 47
Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3rd Cir. 1973) 91
Rosenfeld v. Southern Pacific Company, 444 F.2d 1219 (9th Cir. 1971) 44, 95
Samuel v. University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974) 58
Sanbonmatsu v. Boyer, 9 EPD ¶9704 (N.Y.A.D. 1974) 85
Schlesinger v. Ballard, 419 U.S. 498, 95 S.Ct. 572 (1975) 41, 66
Shull v. Columbus Municipal Separate School District, 338 F.Supp. 1376 (N.D. Miss. 1972) 71
Singer v. Mahoning County Board of Mental Retardation, 379 F.Supp. 986 (N.D. Ohio 1974) 93
Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161 (1944) 32, 93
Smith v. Board of Education of Morrilton School District No. 32, 365 F.2d 770 (8th Cir. 1966) 32
Southeastern Community College v. Davis, ____ U.S. ____ 99 S.Ct. 2361 (1979) 28
Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971) 92
Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373 (1975) 18
Stewart v. New York, 44 U.S.L.W. 2481 (S.D.N.Y. 1975) 47
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971) 22, 39, 73
Texas Woman's University v. Chayklintaste, (Court of Civil Appeals of Texas) On Campus With Women, Number 14, June, 1976 60
Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 89 S.Ct. 518 (1969) 32, 33
Trent v. Perritt, 391 F.Supp. 171 (S.D. Miss. 1975) 58
United States v. Frazer, 297 F.Supp. 319 (D. Ala. 1968) 42
United States v. Hinds County School Board, 560 F.2d 619 (5th Cir. 1977) 23
United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966) *aff'd en banc* 380 F.2d 385 (5th Cir. 1967 *cert. denied sub nom.* 22, 32, 73, 82
United States v. Caddo Parish Board of Education, 389 U.S. 840, 88 S.Ct. 67 (1967) 73
United States v. Mersky, 361 U.S. 431, 80 S.Ct. 459 (1960) 32
United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974) 32
United States v. Reeb, 433 F.2d 381 (9th Cir. 1970) 34
United States v. Wood, Wire and Metal Lathers International Union, Local Union No. 46, 471 F.2d 408 (2nd Cir. 1973) *cert. denied* 412 U.S. 939, 93 S.Ct. 2773 (1973) 39
United Steelworkers of America v. Weber, ____ U.S. ____ , 99 S.Ct. 2721 (1979) 39, 40
University of Toledo v. HEW, 464 F.Supp. 693 (N.D. Ohio 1979) 82
Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 97 S.Ct. 555 (1977) 15, 16
Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3rd Cir. 1976) *aff'd without opinion by an equally divided court*, 429 U.S. 893, 97 S.Ct. 1671 (1977) 23
Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976) 15
Weber v. Aetna Casualty & Surety Company, 406 U.S. 164, 92 S.Ct. 1400 (1972) 14
Weeks v. Southern Bell Telephone & Telegraph Company, 408 F.2d 228 (5th Cir. 1969) 97
Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225 (1975) 14, 18, 77
Whelan v. United States, 529 F.2d 1000, (Ct. Cl. 1976) 21, 22
Williams v. McNair, 316 F.Supp. 134 (D.S.C. 1970) aff'd 401 U.S. 951, 91 S.Ct. 976 (1971) 23
Wilshire Oil Company of California v. Costello, 348 F.2d 241 (9th Cir. 1965) 34
Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603 (1964) 15
Yellow Springs Exempted Village School District v. Ohio Hign School Athletic Association, 443 F.Supp. 753 (S.D. Ohio 1978) 76
Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886) 15

AN INTRODUCTION TO THE HANDBOOK

Title IX and the Achievement of Equal Educational Opportunity: A Legal Handbook is designed to provide an introduction to major issues, controversies, and case law[1] related to Title IX of the Education Amendments of 1972. It is intended for use by education administrators, technical assistance personnel, and attorneys; it is hoped that the information may promote more informed interaction between administrators and the attorneys who represent and advise them regarding sex discrimination issues. Non-lawyers may find Appendix B a valuable starting point for use of the handbook, as it provides basic information on the legal system and legal citation form that is used throughout the text.

As decisions regarding Title IX litigation are issued in the future, the handbook should be torn apart and supplemented. (Holes have been punched in this volume so that it may be inserted in a looseleaf notebook along with any supplementary materials that become available. The internal organization of the handbook is similarly designed for section-by-section insertion.) Supplementary materials may be forthcoming from the Women's Law Fund or the Council of Chief State School Officers' Resource Center on Sex Equity. Other information may be found in local newspapers and civil rights newsletters.

---

[1] Policy interpretations issued by HEW and decisions by administrative law judges interpreting Title IX are not within the scope of the handbook.

I. THE NEED

Although the problem of discrimination in education had been recognized for decades, it was not until after the Supreme Court decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686 (1954) that attention was focused on efforts to eradicate the inequities in the educational system. Ultimately, the problems that women faced within this system, as students and as teachers, became the subject of debate and discussion. As the Commissioner's Task Force on the Impact of Office of Education Programs on Women declared,

> Although women are close to half the working population, education is still preparing them to be housewives. As an employer, the education system is equally guilty. Women working in education can generally expect lower pay, less responsibility and far less chance for advancement than men working at the same level.
>
> The situation is not without its bright spots. But mounting evidence makes it clear that unequal treatment of the sexes is the rule in education, not the exception. As a girl progresses through the education system, she confronts serious biases and restrictions at each level, simply because she is female.

A Look at Women in Education: Issues and Answers for HEW (Report of the Commissioner's Task Force on the Impact of Office of Education Programs on Women, November 1972).

The disparity in treatment begins in the earliest stages of education, both public and private. Outmoded and stereotypical educational programs, which cast individuals into different curricula and programs based on their sex, are failing to prepare males and females for the realities of living. Universities and colleges often maintain quota systems that limit the number of women who can be admitted or impose more stringent admission standards on women. Women who do acquire higher education often become discouraged and discontented because of inadequate vocational counseling and discrimination in the job market.

Furthermore, this sex-role sterotyping is cyclical. Teachers' and counselors' biases and attitudes about the proper role of the sexes in society result in young women relegating themselves to an inferior status, accepting limited career choices, assuming passive roles, and ultimately passing their responses on to their classmates.

After graduation, the prospects for women in education remain bleak. Although women compose a majority of public elementary and secondary school teachers, they make up only a small percentage of school administrators and are almost nonexistent in superintendent roles.

Opportunities at colleges and universities are no greater. Although women are hired to work in these settings, in general they are restricted to teaching courses at the undergraduate levels, are frequently paid less than their male colleagues, and are less likely to be awarded tenure.

To break this cycle, Congress, in 1972, enacted Title IX of the Education Amendments of 1972 (Title 20 U.S.C. § 1681). Prohibiting sex discrimination in any education program or activity receiving federal financial assistance thus became a national priority. The nation could no longer afford the waste of human resources that results from sex-role stereotyping, and Congress could no longer justify supporting with federal funds institutions that perpetuate this discrimination. Reflected in Title IX is Congressional belief that if an educational experience is worthwhile, it is of value to persons of both sexes, and that by participating in educational opportunities offered on a nondiscriminatory basis, all students will be better prepared to fulfill their societal roles.

For more background information relating to the need for Title IX, *see Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcommittee of the House Committee on Education and Labor,* 91st Cong., 2d Sess. (1970) (2 vols.).

II. THE CONCEPT OF DISCRIMINATION

A. Permissible and Impermissible Discrimination[1]

1. The Theory

Decision-making is essentially a process of discriminating. Whenever a legislature decides to impose a special burden or to grant a special benefit to a particular group or class of individuals, that decision requires discriminating among distinct groups or interests, all of which may have legitimate claims of entitlement to the benefit or burden.

> It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. . . . Indeed, the very idea of classification is that of inequality.

Atchison, Topeka & S.F. R.R. v. Mathews, 174 U.S. 96, 106, 19 S.Ct. 609, 613 (1899).

The Fourteenth Amendment to the United States Constitution, however, guarantees to all persons "the equal protection of the laws." This being the case, how does one accommodate the right of the legislature to classify with the right of the individual to equal treatment under the law? More important, perhaps, when does the natural and legitimate process of classifying run afoul of the mandate of equal protection?

Basically, accommodation of the governmental interest with the private interest is achieved through application of the doctrine of reasonableness, the essence of which can be stated simply:

> The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.

Tussman and tenBroek, *The Equal Protection Of The Laws*, 37 Calif. L. Rev. at 344 (footnote omitted) (hereinafter *Tussman*). The ability of a classification to meet this test depends greatly on whether or not the classification includes all who are similarly situated and none who are not. Yet this is not to say that so long as a classification draws its lines on identifiable characteristics (i.e., hair color, height, sex, race, age), it is reasonable: more is required than the mere enactment into law of physiological differences. What is further required is that we look beyond the classification to determine whether or not it meets the purpose of the act. An analysis of this purpose is paramount to a decision as to a classification's reasonableness.

Hypothetically, if we suppose the purpose of a law to be the elimination of a public mischief,[2] then the achievement of that end will be best achieved by defining the classification to include only those who possess the trait identifiable as the mischief. By defining the classification in this manner, the class will automatically include all who are similarly situated with respect to the purpose of the law. When this happens, there is exact congruence between the class defined and the purpose of the law. This is the ideal: perfect reasonableness.

This may not always be practical, however. Frequently, for political or administrative reasons, legislatures classify on the basis of traits that are presumed to be, but are not necessarily, related to the mischief. When this occurs, there are five possible relationships that can result.

If the trait turns out to be exactly congruent to the mischief, then the ideal has been reached. If none of those possessing the trait are tainted with the mischief, then absolute unreasonableness has been achieved, and the classification is invalid.

Between these two extremes are the categories into which most legislation falls. If the classification includes only those who possess the mischief but fails to include all persons who are so tainted, the classification is "underinclusive." By failing to include all who are similarly situated, the classification is *prima facie* unreasonable, but not necessarily invalid. Courts recognize that legislatures cannot be expected to either attack every aspect of a problem or not attack it at all. *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153 (1970). Because new programs are often experimental, legislatures proceed cautiously; courts recognize this caution (as well as administrative convenience) as a legitimate justification for the underinclusiveness of a classification.

If the classification includes within its parameters individuals other than all of those tainted with the mischief, it is overinclusive. Such a classification is more likely to be invalid than is the underinclusive classification. "[O]ver-inclusive classifications reach out to the innocent bystander, the hapless victim of circumstances or association. . . . [S]uch classifications fly squarely in the face of our traditional antipathy to assertions of mass guilt and guilt by association." *Tussman*, at 351–52. Courts will look more closely at the legislative purpose behind these classifications when examining their validity. Justifications to sustain such classifications will have to be more compelling than those advanced to justify underinclusive classifications. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1976).

---

[1] The author is greatly indebted to Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949), for guidance in the development of this chapter. This classic work on equal protection theory, although now 30 years old, continues to provide an analytical approach for evaluating the decision-making process.

[2] *Tussman*, from which this exercise is borrowed, points out that the purpose of a law can be either the elimination of a public mischief or the achievement of some positive good. Analytically, the approach is similar, regardless of which purpose is identified. *Tussman*, at 346.

Finally, there are classifications that are both overinclusive and underinclusive. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225 (1975). These classifications suffer from those deficiencies that are characteristic of their parts.

Working concurrently with the reasonableness test is the belief, basic to American legal theory, that certain classifications come to the court with a presumption of invalidity. Classifications based on accidents of birth (i.e., race, alienage, national origin) are repugnant to the concept of human equality.[3] Rarely, if ever, will classifications drawn on such lines identify with exactitude those tainted with the mischief sought to be controlled. Consequently, although not denying that such classifications could be valid, the court is more exacting in its demand for reasonableness. "It should be noted, to begin with, that all legal restrictions which curtail the rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194 (1944). Such classifications will be sustained only upon a showing that the purpose of the act is of the most compelling nature, and that that purpose cannot be achieved by using a not suspect, less onerous classification.

This approach, as outlined, is basically theoretical. More important, in a practical sense, is how the courts use this theory when analyzing the law and facts presented to them.

2. The Reality

Actions challenging legislative classifications as discriminatory are generally brought under the Fourteenth Amendment to the United States Constitution. This amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[4] When forced to determine whether a legislative classification is consistent with the mandate of the Equal Protection Clause, the Court "requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164, 172, 92 S.Ct. 1400, 1405 (1972). This "rational relationship" test requires inquiry into whether the legislation is in furtherance of a constitutionally permissible purpose and whether the classification adopted reasonably relates to the accomplishment of this purpose. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons, similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561-62 (1920). When making this inquiry the Court traditionally adopts certain presumptions: (1) A classification that has some reasonable basis is not invalid merely because it is not drawn with mathematical nicety or because it results in some inequality; (2) if any state of facts reasonably can be conceived that would sustain the classification, the existence of those facts at the time the law was enacted must be assumed; and (3) the person assailing a classification has the burden of showing that it does not rest on any conceivable rational basis, but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S.Ct. 337, 340 (1910).

If the classification being challenged draws its line along race or national origin, however, courts subject those classifications to a closer examination referred to as strict scrutiny.[5] Under these circumstances, the ordinary presumption of constitutional validity disappears. The inquiry shifts to a determination of whether the legislative purpose is of an overwhelming or compelling public importance (not merely permissible) and whether using the suspect classification is necessary (not merely rational) to achieve that purpose. The burden of proof in this situation rests with the state to demonstrate that the purpose of the act is of overwhelming public importance, and that there are no less drastic means than the suspect classification available to accomplish that purpose. In addition, justifications that may suffice to sustain rational classifications (i.e., administrative convenience, protection of the governmental fisc, federal/state comity, the need for experimentation) will not be sufficient to sustain suspect classifications. *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 1029, n. 9 (1977).

Although this distinction is often termed the "two-tier approach to equal protection analysis," it is becoming more and more evident that what is actually at work is a sliding scale that involves a balancing of interests. When Congress is allocating noncontractual benefits under a social welfare program, the Court is most likely to apply the weakest level of scrutiny, invalidating only the statutes that manifest "a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373 (1960). However, if Congress, when distributing contractual benefits or imposing sanctions, chooses to classify upon archaic, overbroad, stereotypical generalizations, the Court will require that the classification serve an important governmental objective, and that it be substantially related to the achievement of that objective. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1976). Of course, when the legislature, for whatever reason, purposefully classifies upon "a characteristic determined by causes not within the control of the . . . individual, [which] bears no relation to the individual's ability to participate in and contribute to society," *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 2762 (1976), the Court will be especially vigilant in examining this classification.

> Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and

---

[3] Although one would assume that classifications based on the sex of an individual would be equally suspect (being based on an accident of birth), the courts have been reluctant to so conclude. *See* THE CONCEPT OF DISCRIMINATION, Sex Discrimination: A Unique Judicial Approach, *infra* at 17 *et seq.*

[4] The Fourteenth Amendment does not reach purely private conduct but touches only conduct taken by a state or under color of state authority. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449 (1974).

[5] Strict scrutiny is also used to evaluate legislation that infringes on certain rights designated as fundamental (i.e., voting, interstate travel, procreation).

> citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.

Mathews v. Lucas, 96 S.Ct. at 2769 (Stevens, J., dissenting) (footnote omitted).

Further refinements in the analytical process have also developed so as to make certain that judicial enforcement of the mandate of nondiscrimination continues to be effective.

As invidious racial classifications were invalidated, the promise of equality under the law became more and more a reality. But at the same time, opponents of equality developed new and more subtle modes of achieving their illegal goal. Overt discriminatory practices became covert. Thus, it became apparent that a determination as to the constitutionality of a statute would require more than an examination of the language of the act. The courts would have to look beyond the wording of the statute to examine the application and effect of a law.

Statutes, fair in form, that were enforced only against a specific identifiable group were found to be as invalid as facially discriminatory ones.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 374, 6 S.Ct. 1064, 1073 (1886).

The more difficult case was presented by those statutes, neutral in form and fair in application, that effectively resulted in invidious, suspect classifications. Recognizing that its obligation required it to scrutinize "sophisticated as well as simple-minded modes of discrimination," the Court found that contrivances enacted to thwart equality in the enjoyment of a right violate the Constitution. *Lane v. Wilson*, 307 U.S. 268, 275, 59 S.Ct. 872, 876 (1939). Thus, when confronted with evidence of "disproportionate impact" resulting from the effect of a statute, the Court examines the statute more closely to determine the true purpose behind the law. Legislation motivated by racial considerations or resulting in racial classifications is constitutionally suspect and comes to the Court with a presumption of invalidity. *Cf. Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603 (1964). Although disproportionate impact, standing alone, does not require the Court to subject the statute to the strictest scrutiny, *see Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 2049 (1976), "when there is proof that a discriminatory purpose has been a motivating factor in the decision," *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S.Ct. 555, 563 (1977), judicial deference to an otherwise reasonable classification is no longer justified. Because the search for legislative purpose is generally elusive, *Palmer v. Thompson*, 403 U.S. 217, 21 S.Ct. 1940 (1971), "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S.Ct. at 564. Often, an invidious discriminatory purpose can be inferred "from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 2049 (1976). "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action when the governing legislation appears neutral on its face." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S.Ct. at 564. The historical background of the legislative choice will be particularly relevant if it reveals a series of official actions or a sequence of events indicating an invidious purpose. A history of past discrimination will also be important if present events are to be put properly into perspective. Absent proof, however, that the disproportionate impact was the result of a purposeful device to discriminate against a particular class, the Court will apply the traditional test of reasonableness in judging the constitutionality of a particular statute.

However, when evaluating a classification under a congressional mandate of nondiscrimination (i.e., Title VI of the Civil Rights Act of 1964, banning race discrimination and discrimination based on national origin in programs receiving federal financial assistance; Title VII of the Civil Rights Act of 1964, banning discrimination based on race, color, religion, sex, and national origin in employment; Title VIII of the Civil Rights Act of 1964, banning discrimination based on race, color, religion, sex, or national origin in housing), a more rigorous standard is adopted.

Because Congress directed the force of these acts to the consequences of a practice, not simply the motivations behind a practice, discriminatory purpose need not be proved. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. at 2051. In these circumstances, "practices which are fair in form, but discriminatory in operation" are invalid, regardless of intent. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853 (1971). Good intent or absence of discriminatory intent does not redeem otherwise reasonable procedures that operate as "built-in-headwinds" for minority groups. It is necessary, in addition, that practices be validated in terms of performance. Unless it is shown that a specific practice or procedure is necessary for successful performance and that no less discriminatory means exists to achieve this end, the practice or procedure must be discontinued.

Judicial review of practices vis-a-vis compliance with a congressional mandate of nondiscrimination "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact without discriminatory purpose is claimed." *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. at 2051. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971) (requirement of employer that all employees have a high school diploma held to violate Title VII where practice had the *effect* of denying employment to substantially more Blacks than to whites and where high school education not necessary for the successful performance of the job and operation of the business); *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1974) (school system's failure to accommodate needs of non-English-speaking students of Chinese ancestry held to violate Title VI where practice had the *effect*, although no purposeful design was present, of restricting individuals in the enjoyment of an equal education based on their race); *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. 555 (1977) (zoning case remanded for consideration of whether a violation of the Fair Housing Act occurred, despite the finding by the Court that no violation of the Constitution occurred due to the lack of proof of racial motivation.)

The result has been the creation of a more probing standard of scrutiny by which classifications must be judged. When a challenged law, neutral on its face, gives rise to constitutional and statutory questions, it is not sufficient to stop with a determination of whether racial or sexual animus motivated the legislation. Further inquiry must be made to determine if the seemingly neutral classification is the functional equivalent of a prohibited classification (regardless of the motive behind the legislation) and, therefore, is illegal.

B. Sex Discrimination: A Unique Judicial Approach

Historically, the Supreme Court has uniformly accepted the reasonableness of sex-based classifications. In *Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130 (1873), the Court upheld the right of Illinois to prohibit women from practicing law. In his concurring opinion, Justice Bradley explained why such a classification limiting a woman's professional opportunities was reasonable:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.
>
> The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Bradwell v. Illinois, 83 U.S. (16 Wall.) at 141. This attitude became the majority opinion 35 years later in *Muller v. Oregon,* 208 U.S. 412, 28 S.Ct. 324 (1908). In *Muller,* the Court was asked to consider the constitutionality of a state law that prohibited women from working in a laundry more than 10 hours a day. Although three years earlier the Court had struck down a similar statute limiting the hours of bakers, *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539 (1905), the Court voiced different concerns about limitations on women's hours:

> [H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present . . . . [I]n the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when legislation is not necessary for men and could not be sustained. . . . The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

Muller v. Oregon, 208 U.S. at 421–23, 28 S.Ct. at 326–27. Although *Muller* would serve as the foundation for much-needed protective legislation, albeit initially only for women, it would also reinforce the patronizing attitude that the courts and legislatures have harbored toward women and their role in society.

As a consequence, in 1948 in *Goesaert v. Cleary,* 335 U.S. 464, 69 S.Ct. 198 (1948), the Court would uphold the constitutionality of a Michigan statute that did not "protect" women but, as in *Bradwell,* closed another legal occupation—bartending—to certain women. In *Goesaert,* the Court was presented with a challenge to a Michigan statute which provided that women could not pour or dispense drinks from behind a bar unless they were the wives or daughters of male bar owners. Suit was filed by Mrs. Goesaert and her daughter. The mother was the owner of a bar; the daughter was an employee. The plaintiffs argued that the Michigan statute prohibited them from pursuing their occupations and made it impossible to run their business economically.

The Court began its analysis with the assumption that Michigan could constitutionally deny to all women the opportunity to tend bar. The question, as the Court saw it, was whether Michigan could "play favorites among women." Using the minimum level of scrutiny, the Court discovered a conceivably reasonable basis for permitting some women to work behind bars and prohibiting others from doing the same:

> Since bartending by women may . . . give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimized hazards that may confront a barmaid without such protecting oversight.

Goesaert v. Cleary, 335 U.S. at 466, 69 S.Ct. at 200.

And, although the Court was labeling racial classifications "constitutionally suspect," *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954); subject to the "most rigid scrutiny," *Korematsu v. United States,* 323 U.S. 214, 216, 65 S.Ct. 193, 194 (1944); and "in most circumstances irrelevant" to any legitimate legislative purpose, *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 1385 (1943); it continued to apply the minimum scrutiny test to sex-based classifications, regarding women "as the center of home and family life," *Hoyt v. Florida,* 368 U.S. 57, 62, 82 S.Ct. 159, 162 (1961), who should be relieved from the civic duties performed by men.

But this trend has changed. In 1971 the Supreme Court, in *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251 (1971), invalidated a mandatory provision of the Idaho Probate Code that preferred men to women in the administration of a decedent's estate. Although the Court found that the statute's objective was not without some legitimacy, it concluded that that objective was not being advanced in a manner consistent with the Equal Protection Clause. "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. . . . " *Reed v. Reed,* 404 U.S. at 76, 92 S.Ct. at 254. *Reed* was the first time that the Court invalidated a statute establishing a sex-based classification. More importantly, it presented a departure from the traditional minimum scrutiny test uniformly used in sex discrimination cases. The Court had invalidated the statute, despite the existence of a conceivable rational basis (administrative convenience), and was beginning to examine more closely the problems of sexism.

The new awareness of sexism is further evident in *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764 (1973). In this case, four members of the Court joined in a plurality opinion to declare sex to be a suspect classification. Applying the strict strutiny test, they invalidated a military benefits scheme that, for purposes of medical and housing benefits, presumed all wives of servicemen to be dependent on their husbands but that required husbands of servicewomen to prove actual dependency before they could receive benefits under the program.

In departing from the traditional weak scrutiny test, the plurality (comprising Justices Brennan, Douglas, White, and Marshall) recounted the historical status of women:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage.
>
> As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.
>
> [I]t can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most conspicuously, in the political arena.
>
> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and, aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Frontiero v. Richardson, 411 U.S. at 685–7, 93 S.Ct. at 1769–70 (citations and footnotes omitted). This approach was not accepted by the full Court, however. Justices Powell, Burger, and Blackmun, although concurring in the result, did so on the basis of *Reed* without the necessity of declaring sex to be a suspect classification. Justice Stewart merely concurred in the result, and Justic Rehnquist dissented.

Although a majority of the members of the Court still have not concurred in the judgment that sex-based distinctions are inherently suspect, they have taken a more activist approach when scrutinizing these classifications, abandoning overbroad and archaic generalizations that denegrate the value of women's earnings, *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225 (1975); rejecting stereotypical notions about the proper destiny of women, *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373 (1975); and striking down gender-based classifications, which are inaccurate proxies for other, more germane bases of classification. *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451 (1976). Today, to withstand constitutional challenge, classifications by gender must serve important (not merely legitimate) governmental objectives and must be substantially (not just reasonably) related to achievement of those objectives. *Cf. Craig v. Boren,* 429 U.S. 190, 97 S.Ct. at 457. Because in most instances there is a weak congruence between gender and the trait that gender purports to represent, legislatures must either realign their laws in a gender-neutral fashion or be prepared to demonstrate that the sex-centered generalization actually comports to fact. *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. at 458.

III. TITLE IX: THE STATUTE

A. The Enactment Process

Although the problem of discrimination in education against both teachers and students had been recognized and challenged for decades, it was not until the 1960s that serious congressional attention was focused on legislative efforts to eradicate the existing inequities. Although concern initially centered on the problem of racism in education, lawmakers began to become aware of the special and unique problems that women have faced in the educational process in the United States. Many women were denied the opportunity to develop their potential, and other women fortunate enough to have the benefits of higher education were denied the opportunity to use their educational skills. Although the Equal Protection Clause of the Fourteenth Amendment provided some protection against arbitrary policies and practices, the courts had been notoriously unsympathetic to the plight of women.

Indeed, it was not until 1971, in *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971), that the Supreme Court, for the first time, found a sex-based classification to be unconstitutional. Before that time, the Court had justified classifications based on sex by relying on a woman's unique physical characteristics: her maternal functions, her inability to protect herself in the market place, and when all else failed, divine guidance. *See Sex Discrimination: A Unique Judicial Approach, supra* at 17 *et seq.*

Thus, it became increasingly evident to educators and legislators that, just as legislation was necessary to supplement and strengthen the guarantees of the Fourteenth Amendment in the area of race, new legislation was necessary to supplement and strengthen in the area of sex discrimination the protection already in existence.[1]

As a consequence, hearings were held in 1970 to consider amending Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) to include a prohibition of sex discrimination. After lengthy congressional debate, however, Congress became convinced that independent legislation was necessary to provide full relief in the educational sector. Thus, in 1972 Congress enacted Title IX of the Education Amendments of 1972 (Title 20 U.S.C. § 1681). Concurrently, Congress amended the Equal Pay Act to remove the exemption for educational institutions and subsequently extended the definition of *employer* under Title VII to include a state or its political subdivisions with respect to its employees in educational institutions. Legislation then existed that prohibited sex discrimination throughout the educational process, including overlapping remedies in some areas (i.e., employment).[2]

As enacted, Title IX provides, in essence, that no person shall be discriminated against on the basis of sex in any education program receiving federal financial assistance, except (1) in certain institutions in which substantially all the students are of the same sex (including United States military schools and the merchant marine); (2) in institutions changing from one sex to coeducational enrollments, in which case such institutions are exempt from the provisions of this title for seven years if operating under a plan approved by the Commissioner of Education; and (3) education institutions controlled by religious organizations where compliance would not be consistent with religious tenets. Although more restrictive to some degree in its scope than Title VI (which prohibits discrimination on the basis of race, color or national origin in *any* program receiving federal financial assistance, with no exception), Title IX does not contain the exception found in Title VI that limits the coverage of employment practices to only those instances where the objective of the federal financial assistance is to provide employment. (*But see* THE IMPLEMENTING REGULATIONS, Section-By-Section Analysis, Subpart E, Employment, for a discussion of *Romeo Community Schools v. United States Department of Health, Education, and Welfare*, 438 F. Supp. 1021 (E. D. Mich. 1977), *aff'd,* ____F.2d____, 19 FEP Cases 1720 (6th Cir. 1979) and related cases, *infra* at 81 *et seq*).

B. The Amendment Process

Title IX has been amended twice since its enactment and has been the subject of special legislation once. These amendments have reflected the concern that Title IX as enacted might not coincide with congressional intent.

During the summer of 1974 bills to amend Title IX were introduced in the House and Senate. The proposed Senate amendment provided that Title IX's prohibition against sex discrimination would not apply to any intercollegiate athletic activity to the extent that such activity actually does or may produce revenue or donations to the institution necessary to support such activity. In addition, the bill would have required the Secretary to publish proposed regulations to implement Title IX within 30 days after the enactment of the amendment. The Senate bill was not enacted, however. A compromise bill, effective August 21, 1974, required the Secretary to

---

[1] In response to this new awareness, Congress enacted new legislation aimed, in part, at protecting at least some women. In 1963 Congress enacted the Equal Pay Act as an amendment to the Fair Labor Standards Act (29 U.S.C. § 206(d)), and in 1964 Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) made sex discrimination in employment an illegal practice. However, both statutes exempted public education institutions from their coverage.

[2] The existence of these overlapping remedies has generated much confusion, with little guidance to those institutions mandated to comply with the requirements of various acts. Practices that may be constitutional or permissible under one statute may still violate other acts. In addition, an individual who feels that her or his rights have been infringed may pursue each remedy independently even if the result is conflicting rulings on the various claims. In *International Union of Electrical Workers v. Robbins & Myers*, 429 U.S. 229, 97 S.Ct. 441 (1976), the Supreme Court held that the remedies created by the various civil rights acts are independent of other preexisting remedies available to an aggrieved individual, and that these remedies can be pursued concurrently. As a result, administrators faced with overseeing the compliance efforts within their institutions must insure that their policies not only meet the mandates of one enactment, but comply with the mandates of all.

> prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Pub. L. 93–380, Title VII, § 844, 88 Stat. 612 (Aug. 21, 1974). By the time the law became effective, the Secretary had already published proposed regulations implementing Title IX in the Federal Register. 39 Fed. Reg. 22228 (June 20, 1974).

Later in 1974 Congress began the process of amending Title IX to exempt specific practices from the scope of the law. Pub. L. 93–568, 88 Stat. 1862, codified at Title 20 U.S.C. § 1681 (a)(6), (approved December 31, 1974, effective on, and retroactive to, July 1, 1972), exempted from Title IX's mandate of nondiscrimination the membership practices (1) of certain social fraternities and sororities, exempt from taxation, that consist primarily of students in attendance at an institution of higher education; and (2) YMCA, YWCA, Girl Scouts, Boy Scouts, Ca[illegible] Girls, and certain voluntary youth service organizations.

Then, as part of the Education Amendments of 1976, Pub. L. 94–482, Title IV, § 412(a), 90 Stat. 2234 (approved and effective October 12, 1976), Congress increased the list of exemptions. The following are now exempt from the applicability of Title IX:

1. any program or activity relating to Boys State, Boys Nation, Girls State, or Girls Nation;
2. father–son, mother–daughter activities to a certain degree; and
3. financial assistance awarded by an institution of higher education to an individual because of personal appearance, poise, or talent where eligibility is limited to individuals of one sex only.

C. Section-By-Section Analysis

20 U.S.C. § 1681, As amended

Sex—Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

In regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

In regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

This section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

In regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

This section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under Section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations, which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) American Legion activities

This section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State Conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institutions specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

This section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

This section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) Educational institution defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the cases of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each school, college, or department.

DISCUSSION

Section 1681(a), the general prohibitory section of Title IX, exhibits its kinship to Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d). Originally proposed as an amendment to Title VI, section 1681(a) as enacted is somewhat more limited in its scope, applying only to educational programs or activities and containing numerous exceptions to its coverage. Nevertheless, the exceptions to the act must be narrowly construed because Title IX, like Title VI, represents Congress's concern that it had the constitutional duty to act against private discrimination in educational programs receiving federal financial assistance.

> [N]ot only is the government prohibited from authoring state sponsored discrimination, it is also prohibited from acquiescence in the discriminatory practices of public or private entities which participate in the Federal program. . . . It is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.
>
> In extending financial assistance, Congress unquestionably has plenary authority to impose such reasonable conditions on the use of granted funds or other assistance as it deems in the public interest.

Bob Jones University v. Johnson, 396 F. Supp. 597, 608, 606 (D.S.C. 1974), *aff'd sub nom, Bob Jones University v. Roudebush,* 529 F.2d 514 (4th Cir. 1975). The enactment of Title IX, as well as of Title VI, exemplifies the use of that authority.

Analytically, the statute can be viewed as requiring the convergence of six conditions before its mandate of nondiscrimination becomes operative: (1) A person, (2) in the United States, (3) must be excluded from participation in, denied the benefits of, or subjected to discrimination, (4) on the basis of sex, (5) under an education program or activity, (6) receiving federal financial assistance. If any one of these conditions is absent, Title IX is inapplicable.

The first two conditions are rather self-explanatory. Persons (not just citizens) in the United States have been granted rights by the act. This right is not merely a right of nondiscrimination, however. The act promises that individuals shall not be excluded from participation in, denied the benefits of, or discriminated against because of sex. Although these three phrases may seem functionally equivalent, they are not. In *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786 (1974), the Supreme Court was required to interpret similar language appearing in Title VI. The plaintiffs in *Lau,* non-English-speaking students of Chineses ancestry, alleged that the failure to provide special instruction in English taught by bilingual teachers denied to them an equal educational opportunity. In analyzing the facts of the case, the Court recognized that the students had been provided the same facilities, textbooks, teachers, and curriculum as English-speaking students. Nevertheless, the Court concluded that the school system had violated Title VI by effectively denying the non-English-speaking students "a meaningful opportunity to participate in the educational program." *Lau v. Nichols,* 414 U.S. at 568, 94 S.Ct. at 789.

Similarly, what is mandated by Title IX is not merely an illusion of equality, but equality without hindrance because of an individual's sex.

Although Title IX is limited to educational programs or activities, it is not limited in its scope to schools. Any recipient of federal financial assistance that operates an education program or activity is subject to the act. An example of this scope is apparent from examining *Piascik v. Cleveland Museum of Art,* 426 F. Supp. 779 (N.D. Ohio 1976). In *Piascik,* a female applicant for the position of museum security guard alleged that she had been denied employment because of her sex in violation of Title IX. The initial question to be answered by the court was whether the museum was covered by the nondiscrimination mandate of the act. Finding that the museum received federal financial assistance for an educational program that it operates in conjunction with a local school system, and that the museum curators perform teaching functions for students enrolled at a local university, the court determined that, indeed, the museum was covered by Title IX.

The receipt of federal financial assistance by an education program or activity need not be direct for the protections of the act to become operative. The literal language of the act requires only federal assistance, not payment, to an educational program or activity. Despite the fact that no federal monies went to the program challenged by Ms. Piascik—the employment of guards—Title IX coverage was found to exist. This conclusion is consistent with holdings interpreting Title VI. *Bob Jones University v. Johnson,* 396 F. Supp. 597 (D.S.C. 1974), *aff'd sub nom. Bob Jones University v. Roudebush,* 529 F.2d 514 (4th Cir. 1975) (admission criteria of university subject to scrutiny under Title VI because of receipt by students of veterans' educational benefits, because the payment to veterans defrayed the costs of the offered education program, thereby releasing institutional funds for use elsewhere); *see also, Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18, 91 S.Ct. 1267, 1277 (1971); *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786 (1974); *United States v. Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966), *aff'd en banc* 380 F.2d 385 (5th Cir. 1967) *cert. denied sub nom. United States v. Caddo Parish Board of Education,* 389 U.S. 840, 88 S.Ct. 67 (1967); *Bossier Parish School Board v. Lemon,* 370 F.2d 847 (5th Cir. 1967). However, see discussion *infra* at 81 *et seq.* concerning *Romeo Community Schools v. United States Department of Health, Education, and Welfare,* 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd* ____ F.2d ____, 19 FEP Cases 1720 (6th Cir. 1979) and related cases. What becomes apparent is that, as is the case with Title VI, the scope of the act's coverage may not be self-evident, but may require close scrutiny of an educational system's overall structure.

Subsection 1681(a)(1) contains the first of the exceptions to the general prohibition against sex discrimination. It exempts from the act the *admission* policies of all educational institutions, except institutions of vocational education, professional education, and graduate higher education, and public institutions of undergraduate higher education. The two major kinds of educational institutions that benefit from this exemption are private institutions of undergraduate higher education and all institutions of elementary and secondary education. But exemptions from Title IX's coverage does not necessarily mean that these institutions can exclude members of one sex from their programs of study with impunity.

In *Berkelman v. San Francisco Unified School District,* 501 F.2d 1264 (9th Cir. 1974), female students who sought entry to one of the school district's comprehensive, college-preparatory high schools challenged as unconstitutional the application of higher admission requirements for girls (3.25 grade-point average) than for boys (3.0 grade-point average). The school district asserted that the policy was designed to produce an equal distribution of boys and girls at the school. Although the court noted that section 1681 did not extend to the admission practices of public secondary schools (§ 1681(a)(1)), it concluded that this omission "indicates nothing more than that Congress did not know the manner, extent, or rationale of separate education below the college level, and could not anticipate the effect of the prohibition upon such single-sex schools." *Berkleman v. San Francisco Unified School District*, 501 F.2d at 1269. The court then held that the use of higher admission standards for female than for male applicants violates the Equal Protection Clause of the Fourteenth Amendment. A similar result was reached in *Bray v. Lee*, 337 F. Supp. 934 (D. Mass. 1972), in which the court concluded that the use of separate and different standards for admission of boys and girls to the sex-segregated Boston Latin schools constituted a violation of the Constitution.

A similar scenario was followed as to public institutions of undergraduate higher education before the enactment of Title IX.

In *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), a male plaintiff sought to enjoin the enforcement of a state statute that limited the regular admissions to females in one of the state's eight colleges and universities. It was stipulated by the parties that "a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex." *Williams v. McNair*, 316 F. Supp. at 137. There was no suggestion that there was any special feature connected with the female school (Winthrop College) that would make it more advantageous educationally than any number of other state-supported institutions. Under those circumstances the court concluded that the limitation was constitutional. On appeal, this case was affirmed without opinion by the Supreme Court. *Williams v. McNair*, 401 U.S. 951, 91 S.Ct. 976 (1971).

In contrast, in *Kirstein v. Rector and Visitors of University of Virginia*, 309 F. Supp. 184 (D. Va. 1970), (three-judge court), the federal court in Virginia concluded that the refusal of the university to admit women to the all-male college at Charlottesville was a denial of equal protection. Avoiding the question of whether "separate but equal" was a valid principle in cases of sex-segregation, the court based its decision on the aura of "prestige" and the uniqueness of the courses of instruction available at Charlottesville:

> [I]t seems clear to us that the Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state.

Kirstein v. Rector and Visitors of University of Virginia, 309 F. Supp. at 187.

But the constitutional question is not yet resolved. The Supreme Court, by a 4-to-4 vote, affirmed, without opinion, *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880 (3rd Cir 1976), *aff'd without opinion by an equally divided Court*, 429 U.S. 893, 97 S.Ct. 1671 (1977). *Vorchheimer* involved a challenge to the Philadelphia School System's practice of providing two superior academic high schools that are segregated by sex: Central High for boys and Girl's High for girls. Central, the second oldest high school in the nation, was alleged to be unique because of its national reputation, rich endowment, and superior scientific facilities. Girl's High, although also a superior school, was alleged not to share these qualities. Susan Vorchheimer, desirous of obtaining the best education available, sought admission to Central and was denied admission solely because of her sex. She chose to challenge this practice as unconstitutional. There was no Title IX violation alleged because the admission practices of public high schools are exempt from Title IX's coverage. At the trial level, the federal court concluded that to deny gifted females admission to Central violated their constitutional rights. On appeal, however, the decision was reversed, with the court of appeals holding that because some educators recognized validity in a sex-segregated education, and because the facilities were comparable (although not equal), there was no violation of the Constitution.

An additional argument, raised by the school system for the first time on appeal, relates to the meaning of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701–1758. During 1974 Congress had enacted legislation that provides, in part, that the maintenance of dual school systems in which students are assigned to school solely on the basis of sex denies to those students the equal protection of the laws guaranteed by the Fourteenth Amendment. Susan Vorchheimer argued that Congress, by enacting this legislation, intended to prohibit sex-segregated schools at the high school level. This argument, however, was rejected by the court of appeals.

In the Supreme Court, the justices split 4 to 4 (Justice Rehnquist did not participate in the decision). Such a split results in the lower decision being affirmed. No opinion was issued by the Court. The Supreme Court thus left unresolved not only the meaning of the Educational Opportunities Act of 1974, but also the question of whether the concept of separate but equal has validity in a sex-segregated public education.

However, in *U.S. v. Hinds County School Board*, 560 F. 2d 619 (5th Cir., 1977), the court did discuss the Educational Opportunity Act of 1974 (20 U.S.C. § 1701 et seq.). In *Hinds*, 1 of 30 school desegregation cases arising out of the Southern District of Mississippi, a sex-segregated student assignment plan had been approved by the court of appeals as an interim emergency measure to stabilize education within a desegregating school district. Subsequently, Congress adopted the Equal Educational Opportunity Act, declaring it to be the policy of the United States that all children in public schools are entitled to equal educational opportunity without regard to sex. As a consequence, the court was asked to review its earlier ruling in light of this new legislation. Of Title 20 U.S.C. § 1701 *et seq.*, the court said that the statute incorporates the judgment that a sex-segregated school system is a dual rather than unitary system and results in similar if not equivalent injury to school children as would occur if a racially segregated school system were imposed. But the court held that Congress did more than just make a declaration. It expressly prohibited any sex-segregated, student-assignment plan. As a consequence, the court struck down the establishment of a sex-segregated system.

As a result of these constitutional precedents, subsection 1681(a)(1) may effectively exempt only private institutions of undergraduate higher education that are not subject to the mandates of the Constitution.

Subsection 1681(a)(2) grants a one-year grace period to all educational institutions in regard to admissions. Thus, even the schools covered by subsection 1681(a)(1) were given until June 23, 1973, to modify and adjust their admission standards. Furthermore, educational institutions that, on June 23, 1972, were changing from being single sex to being coeducational in furtherance of a transition plan approved by the United States Commissioner of Education were given an additional six years (until June 23, 1979) in which to complete this transition. If a single-sex school (not otherwise exempt) fails to develop a transition plan that is approved by the Commissioner of Education, then its admissions process must be free of sex bias as of June 23, 1973. Of course, as is the case with subsection 1681(a)(1), once a school begins to admit students of both sexes, all students must be treated without discrimination. In addition, the transition period does not relieve any institution of its obligation toward its employees.

Subsection 1681(a)(3) exempts from the act's proscription education institutions that are controlled by religious organization to the extent that compliance would be inconsistent with the religious tenets of such organizations. The exemption is not all inclusive but is limited to conflicts between Title IX and tenets, not merely custom, habit, or tradition. In contrast to this is subsection 1681(a)(4), which exempts, for all purposes, educational institutions whose primary purpose is the training of individuals for the military service of the United States or the merchant marine. Not exempt by this subsection are those institutions which, although offering programs for the training for military service, do not do so as their primary purpose.

Subsection 1681(a)(5) extends an absolute exemption to the admission policies of any public institution of undergraduate higher education which, traditionally and continually from its establishment, has had a policy of admitting only students of one sex. Yet because violations of the Constitution cannot be sanctioned by Title IX, these institutions potentially face problems similar to those confronted in *Kirstein v. Rector and Visitors of University of Virgina*, 309 F. Supp. 184 (D. Va. 1970) (three-judge court). If an institution in this group elects to become coeducational, subsection 1681(a)(2) grants that school at least seven years in which to complete its transition before its admission policies become subject to Title IX, provided that its plan for transition has been approved by the Commissioner of Education. Needless to say, institutions that have not limited their admissions to one sex "traditionally and continually" from their *establishment* will *not* be entitled to claim this exemption from Title IX.

Subsection 1681(a)(6) exempts from coverage the membership practices of certain social fraternities or sororities, as well as the membership practices of the YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls, and similar voluntary youth service organizations whose membership traditionally has been limited to persons of one sex and principally persons of less than 19 years of age.

Subsection 1681(a)(7) exempts, for all purposes, programs related to the American Legion sponsored Boys State conference, Girls State conference, Boys Nation conference, and Girls Nation conference, including the activities performed by secondary schools or educational institutions in connection with these programs.

Subsection 1681(a)(8) provides that section 1681(a) shall not preclude the sponsoring of father–son/mother–daughter activities. If such activities are offered for students of one sex, however, opportunities for resonably comparable activities must be provided for students of the other sex.

Subsection 1681(a)(9) exempts financial aid that is awarded by an institution of higher education to an individual as an award in a pageant in which attainment of the award is based on factors relating to personal appearance, poise, and talent, and in which participation is limited to individuals of only one sex. Such pageants, however, must not restrict eligibility on the basis of race, color, religion, or national origin.

Section 1681(b) is intended to make clear that Title IX does not require an educational institution to create, through artificial means, a distribution pattern throughout its programs or activities that statistically would be a microcosm of the community or state wherein the institution is located. Statistical evidence becomes relevant, however, in any hearing or proceeding under Title IX, and can be used to show that an imbalance in the receipt of the benefits of a specific program exists.

Section 1681(c) defines an educational institution and provides further that when an educational institution is composed of at least two schools, colleges, or departments that are administratively separate units, each such unit shall be considered a separate educational institution.

20 U.S.C. § 1682

Federal administrative enforcement; report to Congressional Committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

DISCUSSION

Section 1682 provides the mechanism for monitoring compliance and, if necessary, for the eventual termination of federal assistance. The section comprises essentially two parts. The first part grants to each federal department that extends assistance to any education program the authority to issue rules and regulations. Although the U.S. Department of Health, Education, and Welfare (HEW) has exercised this authority, it is not the only such agency that could do so.[1] The rules, once proposed, must be approved by the President before becoming effective. Additional requirements relating to the rule-making process are discussed in the section, THE IMPLEMENTING REGULATION, The Adoption Process, *infra* at 31 *et seq.*

The second part of the section establishes the procedure for securing compliance with the act. If after a hearing the agency makes a finding on the record that a recipient has failed to comply with the requirements of the act (including the regulations), and has determined that compliance cannot be secured through voluntary means, it may effect compliance with the act through terminating assistance to a recipient. Alternatively, it can seek compliance "by any other means authorized by law" that can result in suit being brought by the Attorney General against the recipient to gain compliance with the act. Before either of these provisions can be invoked, the recipient must have been notified of the failure to comply and given an opportunity to remedy voluntarily the violation of the act. In addition, no action to terminate shall become effective until 30 days have elapsed after a report, detailing the circumstances and the grounds for the action, is filed with the committees of the House and the Senate having legislative authority over the program involved.

Finally, when termination does occur, it cannot be an across-the-board cutoff. Termination must be limited to the particular political entity, or part thereof, in which noncompliance has been found, and it shall be limited in its effect to the particular program, or part thereof, in which such noncompliance exists. This "pinpoint" concept is identical to that under Title VI. It is structured in this manner to protect innocent beneficiaries while effectuating compliance with the law. To date there has been only one case to discuss thoroughly the scope of this termination provision.

In *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068 (5th Cir. 1969), administrative hearings were held to determine whether Taylor County's freedom-of-choice plan met the standards of Title VI or was in noncompliance. After a hearing, the examiner found that the district's progress toward desegregation, as to both students and faculty, was inadequate. As a result, the examiner ordered that all classes of federal financial assistance, under any act of Congress administered by HEW, be terminated district wide.

On appeal, the court of appeals concluded that the reviewing authority had exceeded its power in ordering this massive cutoff. "[I]t is not possible to say on the basis of segregation of faculty and students that all programs in the schools in Taylor County are constitutionally defective." *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F. 2d at 1074. The court further concluded that the actions of HEW were clearly disruptive of the legislative scheme:

> The legislative history of 42 U.S.C.A. § 2000e-1 (§ 602 of the Act), indicates a Congressional purpose to avoid a punitive as opposed to a therapeutic application of the termination power. The procedural limitations placed on the exercise of such power were designed to insure that termination would be "pinpoint[ed] . . . to the situation where discriminatory practices prevail.

---

[1] In a letter to Dr. Harriet B. Forkey, Title IX coordinator for the New Hampshire Department of Education, Norman J. Chachkin, of the Office for Civil Rights, stated that, although the Title IX regulations apply only to HEW, Title IX itself prohibits discrimination on the basis of sex in all federally funded education programs and activities. "If discrimination occurs in an educational program or activity that benefits from Federal assistance from another Federal agency, then that agency would have jurisdiction over the matter" (Letter of August 3, 1977).

> [T]he purpose of the Title VI cutoff is best effectuated by separate consideration of the use or intended use of federal funds under each grant statute. If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a "political entity or part thereof"), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of other. . . . Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends.

Board of Public Instruction of Taylor County, Florida v. Finch, 414 F. 2d at 1075–77.

The court was quick to note, however, that discriminatory action in one area of a school program may affect other aspects of the program.

> [W]e do not mean to indicate that a program must be considered in isolation from its context. . . . Clearly the racial composition of a school's student body, or the racial composition of its faculty may have an effect upon the particular program in question. . . . In deference to that possibility, the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.

Board of Public Instruction of Taylor County, Florida v. Finch, 414 F. 2d at 1078.

The concept of "infection" or "taint" has thus become the standard to be considered when termination is a possibility. *See Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd. sub nom. Bob Jones University v. Roudebush*, 529 F. 2d 514 (4th Cir. 1975) (upholding the termination of veterans' educational benefits to eligible veterans enrolled at Bob Jones University because of the racially discriminatory admissions policy of the university).

It is important to recognize that the enforcement provisions of this section cannot be ignored by the separate agencies. In the long-standing case of *Adams v. Richardson*, 480 F. 2d 1159 (D.C. Cir. 1973), the court of appeals concluded that because the record supported a finding that the U.S. Department of Health, Education, and Welfare and its Office for Civil Rights had not properly been enforcing compliance with this section, it was appropriate to compel the department to perform its duty under the act. This was especially so as to those districts in which HEW had made an initial determination of noncompliance and where voluntary efforts to reach compliance had not proved successful. As a consequence, HEW was ordered to begin specific and meaningful compliance efforts, including the establishment of a monitoring system. The continuing nature of that decision has also resulted in the adoption of timelines and procedures for the handling of all complaints filed with the Office for Civil Rights, whether under Title VI or Title IX.

20 U.S.C. § 1683

Judicial Review

Any department or agency action taken pursuant to Section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judical review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to Section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with Chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of Section 701 of that title.

DISCUSSION

Section 1683 reflects the belief that decisions relating to grant termination should not be "committed to unreviewable agency discretion." This provision, identical to one found in Title VI, guarantees judicial review of any final agency action taken with regard to the grant or termination of funds under Title IX. This review can proceed in one of two possible ways. If judicial review is statutorily provided for as to similar agency action (other contract compliance procedures), then that procedure will also be available for Title IX reviews. If no such procedure exists, then review will proceed as provided for in Chapter 7 of Title 5 of the United States Code.

As a consequence, school districts wishing to challenge final decisions of the reviewing authority are guaranteed their day in court. *See Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F. 2d 1068 (5th Cir. 1969); *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd sub nom. Bob Jones University v. Roudebush*, 529 F. 2d 514 (4th Cir. 1975). In addition, individuals alleging injury resulting from the decision of an agency to grant federal financial assistance have had limited success in having the decision reviewed. *See, Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *Cf. Hardy v. Leonard*, 377 F. Supp. 831 (D. Calif. 1974) (A woman claiming that she was denied employment by a police department because of her sex, in violation of Law Enforcement Assistance Adminstration (LEAA) guidelines, has standing to challenge the final determination of LEAA not to terminate funds to the department.)

20 U.S.C. § 1684

Blindness or visual impairment; prohibition against discrimination

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

DISCUSSION

Section 1684 provides that no person in the United States shall, because of blindness or severely impaired vision, be denied admission in any course of study offered by a recipient of federal financial assistance for any education program or activity. Although included as a part of Title IX when enacted, its scope is outside the parameters of this work. It should be recognized, however, that in addition to the guarantees of this section, the Rehabilitation Act of 1973 and the Federal Constitution provide additional rights to the blind. *See Southeastern Community College v. Davis, — U.S., — 99 S.Ct. 2361 (1979).*

In Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F. 2d 184 (3rd Cir. 1977), the court concluded that the refusal of the Philadelphia School District to consider blind persons to be the teachers of sighted students violated the Constitution.

20 U.S.C. § 1685

Authority under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance of guaranty.

DISCUSSION

Section 1685 exempts from Title IX's coverage those programs that receive federal financial assistance only by way of a contract of insurance or guaranty. A similar provision exists under Title VI.

Pub. L. 93–318, Title IX, Section 906

Section 906 of Title IX amended various sections of the Civil Rights Act of 1964 and the Fair Labor Standards Act of 1938.

Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c, *et seq.*), was amended to include within the meaning of *desegregation* the assignment of students to public schools on the basis of sex. As a consequence, the Attorney General is authorized to bring legal proceedings against a school board that so discriminates. The Attorney General was also given the authority to intervene in actions brought by private individuals to eliminate sexually discriminatory practices that may violate the Fourteenth Amendment.

The Fair Labor Standards Act of 1938 (29 U.S.C. § 201, *et seq.*), was amended to include within its coverage certain previously exempt employment practices and to include preschools in the category of institutions covered by that act.

In a similar measure not a part of Title IX, Congress, in 1972, also amended Title VII of the Civil Rights Act of 1964 (4 U.S.C. § 2000e, *et seq.*), so as to include within that act's protections employees of governments, governmental agencies, and political subdivisions of states.

20 U.S.C. § 1686

Interpretation with respect to living facilities.

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

DISCUSSION

Section 1686 represents the congressional concern with the rights to personal privacy that are involved in any attempt to regulate living facilities under Title IX. As a consequence, this section provides that Title IX shall not be construed so as to require coeducational housing. This is not to say that coeducation housing is, therefore, not permitted. Nor is it to say that a recipient can provide separate facilities that are not comparable. Congress has merely determined that, in this limited area, recipients should be free to offer comparable but separate living facilities when problems of personal privacy are involved.

IV. THE IMPLEMENTING REGULATION

A. The Adoption Process

Congress recognized that Title IX was not generically different from the other civil rights legislation already in existence. Thus, in most instances, the bare language of the act would not provide sufficient substantive guidance for the recipients of federal financial assistance who would face specific programmatic or systemic problems. More specific guidance would be necessary if voluntary compliance were expected to be successful. Thus, Congress directed each federal department and agency that is empowered to extend federal financial assistance to any education program or activity to effectuate section 1681 "by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." Said rules, regulations, or orders, however, would not become effective unless and until approved by the President of the United States. Title 20 U.S.C. § 1682. The breadth of this direction was limited by Congress. The agencies or departments were restricted in their task to an effectuation of only the substantive nondiscrimination mandate comprising section 1681. Other provisions of Title IX (i.e., sections 1683, 1684, 1685, and 1686) were not included in this overall statutory directive.

In furtherance of this authority and in compliance with the requirements of the Administrative Procedure Act,[1] the Secretary of the Department of Health, Education, and Welfare gave notice on June 20, 1974, of the department's intention to adopt a regulation to effectuate Title IX of the Education Amendments of 1972. The proposed rules were published in the Federal Register and the public was given until October 15, 1974, to submit to the Director of the Office of Civil Rights written comments, suggestions, or objections to the regulation. By the close of the comment period, more than 9,700 suggestions had been received by the department. After consideration of all relevant matter presented by interested persons, the proposed regulation was redrafted, adopted by the Secretary of HEW, and approved by the President on May 27, 1975. On June 4, 1975, the rules and regulations were published in the Federal Register.

Concurrently with the publication of the rules and regulations in the Federal Register, the Secretary of HEW, as required by Title 20 U.S.C. § 1232(d)(1), transmitted the proposed regulation to the Speaker of the House of Representatives and the President of the Senate. Under this procedure, the regulation becomes effective not less than 45 days after the transmission "unless the Congress shall, by concurrent resolution, find that the standard, rule, regulation, or requirement is inconsistent with the act from which it derives its authority, and disapprove such standard, rule, regulation, or requirement." Title 20 U.S.C. § 1232(d)(1).

In the event a specific regulation becomes the subject of a concurrent resolution of disapproval, the agency that issued the regulation can issue a modified regulation, provided that upon the subsequent publication in the Federal Register and transmittal to Congress, the agency indicates how the modification differs from the disapproved regulation and how the modification disposes of the congressional findings in the concurrent resolution of disapproval. Title 20 U.S.C. § 1232(e).

However, the failure of Congress to adopt a concurrent resolution with respect to any final regulation "shall not represent . . . an approval or finding of consistency with the Act from which it derives its authority . . . nor shall such failure . . . be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding." Title 20 USC § 1232(d)(1).

In furtherance of this statutory directive, hearings were held in Washington, D.C., to review the implementing regulation for Title IX.[2] These hearings failed to result in a concurrent resolution of disapproval, and the regulation, therefore, went into effect on July 21, 1975. Congress did, however, subsequently move to amend Title IX to exempt certain activities that the regulation made clear were covered by the statute as enacted.

The final regulation was codified as Title 45 of the Code of Federal Regulations, Subtitle A, Part 86, which can be found at 40 Federal Register p. 24137 (1975). The regulation is also in Appendix A to this work.

---

[1] Title 5 U.S.C. § 533. The Administrative Procedure Act requires that whenever an agency of the United States proposes to make rules, a general notice of proposed rule-making must be published in the Federal Register. This notice must include a statement of the time, place, and nature of the public rule-making proceedings, a reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved. Thereafter, interested persons must be given an opportunity to participate in the rule-making process through submission of written data, views, or arguments. After "consideration of the relevant matter presented," the agency shall incorporate in the rules adopted a concise general statement of their basis and purposes. Generally, the notice of the proposed rule making must occur not less than 30 days before the effective date of the rules. HEW followed this procedure in adopting the Title IX regulations. *See* 39 Federal Register 22228 (1974); 40 Federal Register 24128 (1975).

[2] These hearings consumed six days during the period between June 17 and June 26, 1975. In addition, hearings were held by the Subcommittee on Equal Opportunities of the Committee on Education and Labor of the House of Representatives on July 14, 1975, to consider House Concurrent Resolution 330 (94th Cong., 1st Sess.), which, if passed, would have disapproved certain sections of the regulation as inconsistent with the Act from which they purported to derive their authority. Following the hearing, House Concurrent Resolution 330 was reported to the full Committee on Education and Labor with a recommendation that it not be passed. The resolution did not pass.

B. The Authoritativeness of the Regulation

The Administrative Procedure Act allows for two categories of rules.[3] There are (1) "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" (Title 5, U.S.C. § 553); and (2) substantive or legislative rules. Interpretative rules are intended to advise the public of an agency's construction of the statutes that it administers. They are clarifications or interpretations of existing laws or regulations. Substantive or legislative rules are rules "other than organizational or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute." Attorney General's Manual on the Administrative Procedure Act 30 (1947). They have the force of law as though they were statutes.

In general, the power of an agency to issue substantive rules having the force of law will depend on whether there has been a delegation of authority to do so. This delegation need not be specific, but can be found to exist in order to further Congress's interest in creating the agency. Ultimately, it is the courts that must decide the scope and breadth of a particular agency's rule-making power.

Significant legal consequences result from the distinctions between the two kinds of rules. Although the Administrative Procedure Act requires that both kinds of rules be published, only legislative rules are subject to the formal rule-making procedures of the act. (See p. 31, footnote 1, *supra* for a discussion of the requirements for formal rule-making.). More importantly, the legal impact of the rules varies according to whether a court classifies them as legislative or interpretative.

When construing legislative rules, rule having the force of law, the responsibility of the courts is limited to a determination of whether the rules are constitutional, within the scope of the granted power and issued pursuant to the proper procedure: It is not free to substitute its judgment as to the content of the rule. *United States v. Mersky*, 361 U.S. 431, 80 S.Ct. 459 (1960); *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974). When construing interpretative rules, rules not having the force of law, courts are free to substitute their judgment as to the content of the rule. But in these instances the rules may be given great weight approximating the force of law depending on the special expertise of the issuing agency, reenactment of the legislation in circumstances that indicate direct approval of the rule, contemporaneous construction of the rule by informed administrators, and long-standing rules.

The opinion to which courts look for guidance in evaluating interpretative regulations is *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944). *Skidmore* involved the Fair Labor Standards Act of 1938. Under that statute, the administrator, although provided for by the statute, was not given rule-making power by Congress. The administrator did have the power to set forth his views of the act under some circumstances. These interpretations, which act as a practical guide to employers and employees, are set forth in an interpretative bulletin. The Supreme Court was required to determine the weight to be accorded this bulletin.

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with the earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. at 140.

The Secretary of the Department of Health, Education, and Welfare has the statutory authority under Title VI to adopt legislative and interpretative rules. Pursuant to this grant, the Secretary has issued regulations and guidelines, both of which have been discussed by courts to some degree.

HEW regulations adopted in compliance with the Administrative Procedure Act and submitted to the President for approval are legislative and have been held to have the force and effect of law. *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1974); *Lee v. Macon County Board of Education*, 270 F. Supp. 859, 862 (D. Ala. 1967). When Alabama enacted a statute that purported to declare the Title VI regulations to be null and void, the federal court in Alabama declared the state law to be in conflict with the HEW regulations. Because the regulations had the force and effect of law, the state law was declared unconstitutional as having been superseded by the federal enactment. *Alabama NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346 (D. Ala. 1967); *Cf. Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 89 S.Ct. 518 (1969); *Blackshear Residents Organization v. Housing Authority of City of Austin*, 347 F. Supp. 1138 (D. Tex. 1972).

Yet HEW guidelines, such as those on desegregation, that were not adopted pursuant to the rule-making procedures of the Administrative Procedure Act, are interpretative and have been held to be entitled to "serious judicial deference" *Smith v. Board of Education of Morrilton School District No. 32*, 365 F.2d 770, 780 (8th Cir. 1966), and "great weight" *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1974); *U.S. v. Jefferson County Board of Education*, 372 F.2d 836, 847 (5th Cir. 1966), *decree corrected*, 380 F.2d 385, *cert. denied*, 389 U.S. 840, 88 S.Ct. 77 (1967). (Guidelines found to be carefully formulated by educational authorities anxious to be faithful to the objectives of the act); *Raney v. Board of Education of Gould School* District, 381 F.2d 252, 255, (8th Cir. 1967) *rev'd on other grounds* 391 U.S. 443, 88 S.Ct. 1697 (1968).

Perhaps the most famous case to shed light on the weight to be accorded the HEW regulations promulgated to effectuate Title VI is *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1974). In *Lau* suit was filed on behalf of non-English-speaking Chinese students seeking equal educational opportunities without regard to their race or national origin, as guaranteed by Title VI. In concluding that the students' rights had been violated by the school district's failure to provide bilingual education, the Court scrutinized only the mandates of Title VI and its implementing regulations and guidelines. The Court held that the regulations had the force and effect of law and that the guidelines were entitled to great weight. 414 U.S. at 571 (Stewart, J., concurring). Because the school district had contractually agreed to comply with Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the HEW regulations issued to effectuate that Act, it was appropriate and reasonable to compel compliance with those standards despite the fact that Title VI standing alone might not have mandated such a result. 414 U.S. at 569, 570.

---

[3] There are essentially three types of agency rules. In addition to legislative and interpretative, there are rules of procedure. Although agencies may be statutorily delegated the authority to issue rules governing their own procedures, agencies also possess inherent authority to establish procedural regulations. Schwartz, Administrative Law 153 (1976).

Inasmuch as section 1682 (and 20 U.S.C. § 1232) authorizes the Secretary to adopt, with the approval of both the President and Congress, regulations to achieve the objectives of Title IX, and the rule-making procedures of the Administrative Procedure Act were followed by the Secretary, it is most likely that the Title IX regulation is legislative as opposed to interpretative and, therefore, has the same force and effect of law as the Title VI regulation. In any event, the regulation should be accorded deference and great weight by courts looking for guidance in interpreting the requirements of the act.

C. The Scope of the Title IX Regulation

Of course, the delegation of rule-making power does not grant the Secretary authority to adopt any regulation intended to achieve a desirable end. Although the Secretary can promulgate any regulation reasonably related to the purposes of the enabling legislation, he cannot adopt a regulation that exceeds the power granted by Congress, *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 96 S.Ct. 1375 (1976); or the Constitution. *Cummins v. Parker Seal Company,* 516 F.2d 544 (6th Cir. 1975), (Celebrezze, J., dissenting), *judgment aff'd by an equally divided court,* 429 U.S. 65, 97 S.Ct. 342 (1976). As the Supreme Court stated in *Mourning v. Family Publications Service,* 411 U.S. 356, 369, 93 S.Ct. 1652, 1660 (1973),

> Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

Although section 1682 adopts as its standard that any regulation promulgated to effectuate the act "be consistent with achievement of the objectives of the statute" (see also Title 20 U.S.C. § 1232(d)(1)), this is functionally identical to the *Mourning* standard. *See State of Florida v. Mathews,* 526 F.2d 319 (5th Cir. 1976), in which a finding of inconsistency is equated to a showing of no reasonable relationship to the purposes of the enabling legislation.

The Title IX Regulation exists today with at least a strong presumption of their consistency with congressional intent. *Cf. Grubbs v. Butz* 514 F.2d 1323 (D.C. Cir. 1975). But compare, Title 20 U.S.C. § 1232(d)(1). Persons attempting to challenge the regulation will shoulder a difficult burden to prove that they are inconsistent with the act. *Johnson's Professional Nursing Home v. Weinberger,* 490 F.2d 841 (5th Cir. 1974). As a consequence, a specific regulation should be followed "unless there are compelling indications that it is wrong," *Red Lion Broadcasting v. F.C.C.,* 395 U.S. 367, 381, 89 S.Ct. 1794, 1802 (1969), and the application of the regulations "would be inconsistent with an obvious congressional intent not to reach the . . . practice in question." *Espinoza v. Farah Manufacturing Company, Inc.,* 414 U.S. 86, 94, 94 S.Ct. 334, 339 (1973). *But see* 20 U.S.C. § 1292(d)(1); *Romeo Community Schools v. United States Department of Health, Education, and Welfare,* 438 F. Supp. 1021 (E. D. Mich. 1977), *aff'd,* ____ F.2d ____, 19 FEP Cases 1720 (6th Cir. 1979); and other cases discussed in THE IMPLEMENTING REGULATION, Section-By-Section Analysis, Subpart E. *infra* at 81 *et seq.*

D. Concerning the Reading of Regulations

Ideally, statutes of general applicability should be written to provide everyone with notice as to what is required for compliance. *Diamond Roofing v. Occupational Safety & Health Review Commission,* 528 F.2d 645 (5th Cir. 1976). In the area of civil rights, and particularly in antidiscrimination legislation, however, much has been left unsaid in the statutes, with regulations intended to be the means for establishing the specific requirements of each law. Title IX is no different in this regard than Title VI (42 U.S.C. § 2000d), or Title VII (42 U.S.C. § 2000e), but the regulations will be of little value unless they are read and understood. Certain principles can be helpful in performing this function.

Initially, one need not look to the regulations if the ordinary and commonly understood meaning of the words in the statute leaves no doubt as to the construction of the act and does not result in a conclusion contrary to the clear intent of Congress. *Thorpe v. Housing Authority of City of Durham,* 393 U.S. 268, 89 S.Ct. 518 (1969); *Whelan v. United States,* 529 F.2d 1000, 1002 (Ct. Cl. 1976). Similarly, if the plain meaning of a regulation is contradictory to the mandate of the statute, then the regulation is invalid. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652 (1973). Of course, when the statute is unclear, then the regulation must be examined for guidance. *Whelan v. United States*, 529 F.2d 1000 (Ct. Cl. 1976). Again, the plain meaning of the words will be crucial, as will be the relation between the regulation and the statute it purports to implement. Cross-reading thereby becomes essential. In furtherance of this, and in compliance with Title 20 U.S.C. section 1232(a), immediately following each substantive provision of the Title IX regulations are citations to the particular section or sections of statutory law on which the regulation is based.

However, reliance on the apparent plain meaning of words may not always be determinative. Generally, the use of *shall* or *may* will be helpful in determining whether the regulation is mandatory or directory in nature, but these words do not necessarily have to be interpreted in this manner. *Shall* sometimes will be directory; *may* can be mandatory. *Wilshire Oil Company of California v. Costello*, 348 F.2d 241, 243 (9th Cir. 1965). "The interpretation of these words depends upon the background circumstances and context in which they are used and the intention of legislative body or administrative agency which used them." *United States v. Reeb*, 433 F.2d 381 (9th Cir. 1970). *See also Diamond Roofing v. Occupational Safety & Health Review Commission*, 528 F.2d 645 (5th Cir. 1976), for a discussion as to why, under Occupational and Safety Health Act regulations, a roof is not a floor. It must also be remembered that in legislative rule-making, agencies reason from the particular to the general, so that the specific evil at which a regulation is aimed may not always be apparent from the first reading of the regulation. *California v. LaRue*, 409 U.S. 109, 115, 93 S.Ct. 390, 395 (1972).

If confusion still reigns, it will often be helpful to examine both previously proposed regulations and comparable regulations implementing similar legislation. At this point, it may be necessary to solicit the assistance of someone trained in legal research to feret out these guideposts. Certainly, the assistance of qualified counsel will be helpful whenever legal interpretations become necessary. This guidance will also be essential if it should become necessary to seek an interpretative opinion from either HEW or the courts.

E. Section-By-Section Analysis[1]

The Title IX regulation of the Department of Health, Education, and Welfare is divided into six separate subparts: A—Introduction; B—Coverage; C—Admissions and Recruitment; D—Education Programs and Activities; E—Employment; and F—Procedures.

Subpart A – Introduction

Subpart A is the general introductory section that includes definitions of terms used in the regulation, provisions concerning remedial and affirmative actions, self-evaluations and assurances of compliance, and provisions concerning the effect of state and local laws and other requirements.

§ 86.1 Purpose And Effective Date[2]

The purpose of this part is to effectuate Title IX of the Education Amendments of 1972, as amended by Publ. L. 93–568, 88 Stat. 1855 (except Sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate Section 844 of the Education Amendments of 1974, Publ. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

DISCUSSION

This provision sets forth the general purpose of the regulations—to effectuate Title IX of the Education Amendments of 1972 (excluding the provisions relating to the blind and the amendments to other independent acts). Included in the final regulation, but excluded from them as initially proposed, is the clause that makes it clear that the education program or activity that receives federal financial assistance need not be offered or sponsored by an educational institution to be covered by the regulations. This interpretation is consistent with the one case that has interpreted the scope of the act itself to reach such activity. *Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio 1976) (concluding that the Museum's hiring practices are subject to scrutiny under Title IX, although the Museum is not an educational institution under the language of the Act).

In addition, this section makes it clear that the regulation is intended to comply with the mandate of Congress contained in section 844 of the Education Amendments of 1974, which directed the Secretary to prepare and publish regulations implementing the Act. *See* TITLE IX: THE STATUTE, The Amendment Process, *supra* at 19, *et seq.*

The remaining portions of this section of the regulation relating to the effective date of the regulation and the specific references to the enactments being implemented are in the regulation to meet the mandate of the Administrative Procedure Act. (See Discussion under THE IMPLEMENTING REGULATION, The Adoption Process, *supra* at 31, *et seq.*).

---

[1] In the Section-By-Section Analysis, each section begins with the relevant portion of the regulation reprinted in small type; it is followed by the DISCUSSION, which considers issues and case law relevant to the section of the regulation under analysis.

[2] Section numbers refer to the regulation as published in 1975, codified as 45 C.F.R., Part 86. The regulation was republished in 1980 as 45 C.F.R., Part 106. § 86.1 of the regulation as cited in this *Handbook* corresponds to § 106.1 of the republished regulation.

§ 86.2 Definitions

As used in this part, the term—

(a) "Title IX" means Title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by Section 3 of Pub. L. 93–568, 88 Stat. 1855, except §§ 904 and 906 thereof; 20 U.S.C. §§ 1681, 1682, 1683, 1685, 1686.

(b) "Department" means the Department of Health, Education, and Welfare.

(c) "Secretary" means the Secretary of Health, Education and Welfare.

(d) "Director" means the Director of the Office for Civil Rights of the Department.

(e) "Reviewing Authority" means that component of the Department delegated authority by the Secretary to appoint and to review the decisions of, administrative law judges in cases arising under this Part.

(f) "Administrative Law Judge" means a person appointed by the reviewing authority to preside over a hearing held under this Part.

(g) "Federal financial assistance" means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant, or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) "Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) "Applicant" means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) "Educational institution" means a local educational agency (L.E.A.) as defined by Section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) "Institution of graduate higher education" means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) "Institution of undergraduate higher education" means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) "Institution of professional education" means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) "Institution of vocational education" means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not if offers fulltime study.

(o) "Administratively separate unit" means a school department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) "Admission" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) "Student" means a person who has gained admission.

(r) "Transition plan" means a plan subject to the approval of the United States Commissioner of Education pursuant to Section 901(a)(2), of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

DISCUSSION

This section of the regulation contains definitions of those terms that frequently appear throughout the regulation and have a separate legal significance. Some of the definitions are rather routine (i.e., *Department, Secretary, Director*). Other definitions have no particular meaning, *vis-a-vis* the final regulation, but rather are carry-overs from the earlier proposals. As initially proposed, the regulation contained a lengthy subpart relating to compliance procedures and judicial review. As adopted, however, this subpart was substantially altered. As a result, the definitions of *Reviewing Authority* and *Administrative Law Judge* have little significance to the final regulation.

Section 86.2(g) contains the definition of "*Federal financial assistance.*" Its scope is very broad and has substantial support in case authority. Conceptually, the regulation adopts the legal axiom that the federal government may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish directly. As a consequence, if a program offered by the federal agency directly would be subject to challenge under the Constitution, then that program, offered by a private institution but paid for with Federal monies, is no less challengeable. *Bob Jones University v. Johnson,* 396 F. Supp. 597 (D.S.C. 1974), *aff'd sub nom. Bob Jones University v. Roudebush,* 529 F.2d 514 (4th Cir. 1975); *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856 (1961); *Gilmore v. City of Montgomery, Alabama,* 417 U.S. 556, 94 S.Ct. 2416 (1974) (Does a municipality's involvement in the alleged discriminatory activity of segregated private schools and other private groups, through the provision of recreational facilities, subject the private groups to the nondiscrimination mandates of the federal Constitution?). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299, 86 S.Ct. 486, 488 (1966).

Subpart (g)(1)(ii) has been the subject of interpretation since the issuance of the regulations. The authority to include within the definition of federal financial assistance funds paid to or on behalf of students under Title VI was discussed in *Bob Jones University v. Johnson,* 396 F. Supp. 597 (D.S.C. 1974), *aff'd sub nom. Bob Jones University v. Roudebush,* 529 F.2d 514 (4th Cir. 1975). There the court held that Veteran's Administration benefits that were used by veterans attending the university constituted federal assistance within the meaning of Title VI, thereby making the school subject to the nondiscrimination provisions of that act. A similar interpretation has been issued relating specifically to Title IX. Former Office for Civil Rights Director Martin Gerry, in a letter to Hillsdale College, stated that a college or university that receives federal funds for student assistance is subject to the requirements of Title IX, even if it receives no other forms of federal aid *(On Campus With Women,* the newsletter of the Project on the Status of Education of Women of the Association of American Colleges, Number 14, June 1976, page 1).

The word *recipient* has also been the subject of judicial interpretation. Again, in the *Bob Jones* case the court pointed out that a recipient is not be be confused with the beneficiary of federal assistance. "The recipient is the intermediary entity whose nondiscriminatory participation in the federally assisted program is essential to the provision of benefits to the identified class which the federal statute is designed to serve." *Bob Jones University v. Johnson,* 396 F. Supp. 597, 601, n. 15 (D.S.C. 1974). *Cf. Piascik v. Cleveland Museum of Art,* 426 F. Supp. 779 (N.D. Ohio 1976); *Brenden v. Independent School District 742,* 477 F.2d 1292 (8th Cir. 1973).

§ 86.3 Remedial And Affirmative Action And Self-Evaluation

(a) Remedial action. If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

(b) Affirmative action. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) Self-evaluation. Each recipient education institution shall, within one year of the effective date of this part:

(i) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) Availability of self-evaluation and related materials. Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Director upon request, a description of any modifications made pursuant to subparagraph (c)(ii) and of any remedial steps taken pursuant to subparagraph (c)(iii).

DISCUSSION

This section of the regulations considers three interrelated concepts: remedial action, affirmative action, and self-evaluation.

Section 86.3(a) provides that if the Director determines that a recipient has violated the mandate of Title IX, the Director may require the recipient to take remedial action to overcome the effects of such discrimination. These requirements may or may not require the use of sexual classifications to remedy the past violations. This result is consistent with case authority interpreting the Constitution, *Swann v. Board of Education,* 402 U.S. 1, 91 S.Ct. 1267 (1972); Title VII of the Civil Rights Act of 1964, *United States v. Wood, Wire and Metal Lathers International Union, Local Union No. 46,* 471 F.2d 408 (2nd Cir. 1973), *cert. denied,* 412 U.S. 939, 93 S.Ct. 2773 (1973); and the Executive Orders, *Contractors Association of Eastern Pa. v. Secretary of Labor,* 442 F. 2d 159 (3rd Cir. 1971), *cert. denied,* 404 U.S. 854, 92 S.Ct. 98 (1971), all of which have mandated or permitted affirmative action amounting to racial classsifications, including preferential hiring goals, to overcome the continuing effects of past discriminatory treatment.

The more difficult situation is presented by section 86.3(b), which *permits* a recipient to take affirmative action to overcome the effects of limited participation by persons of a particular sex absent a finding, judicial or otherwise, of past discrimination. Such affirmative actions are often labeled as reverse discrimination and, where engaged in by public entities, have been challenged as unconstitutional. *DeFunis v. Odegaard,* 416 U.S. 320, 94 S.Ct. 1704 (1974); *Regents of University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733 (1978). But often the complaints lodged against affirmative action plans are the result of misunderstanding. Affirmative action does not require special preferences being granted to members of one sex or race. More properly, it involves identifying barriers to equal opportunity and the affirmative effort to remove these barriers. In some instances, however, it may be appropriate to actually resort to the "preference" method, if the goal sought to be achieved is compelling and can be achieved in no other way. *See* THE CONCEPT OF DISCRIMINATION, The Theory, *supra* at 13.

The conflicting attitudes to this "race conscious" approach are represented in *Bakke v. Regents of the University of California,* 132 Cal. Rptr. 680, 553, Pac. 2d 1152 (1976), *aff'd in part, rev'd in part sub nom. Regents of University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733 (1978) and *United Steelworkers of America v. Weber,* ___ U.S. ___, 99 S.Ct. 2721 (1979). In *Bakke,* an unsuccessful white applicant for admission to medical school at a state university challenged the special admission program established to benefit disadvantaged students. Under the program, 16 of the 100 available positions at the medical school were reserved to disadvantaged students. These students were measured by separate, less stringent admission standards than were advantaged students, resulting in the admission to the program of study of persons who, by the university's own standards, were not as qualified for the study of medicine as some rejected students. At the trial, the state court found that although the special admission program purported to be available to any *disadvantaged* student, only *minority* students had been admitted under the program since its inception. The university did not question that nonminority students were barred from the program.

On appeal to the California Supreme Court, the court held that the mere fact that a program classified students on the basis of race did not render it unconstitutional. It was recognized that such classifications have been upheld where the purpose of the classification was to benefit rather than to disable minority groups. To be permitted to stand, however, such classifications must be shown to serve a compelling state interest, and there must be no less onerous means of achieving this goal.

In its effort to meet these requirements, the university argued that the program was necessary to integrate the medical school and the profession and to increase the number of doctors willing to serve the minority community. A third justification, that Black doctors would have a better rapport with Black patients, was totally rejected by the court as unduly parochial.

Accepting the first two justifications as compelling, the court concluded that the university had not demonstrated that these basic goals of the program could not be substantially achieved by a means less detrimental to the rights of the nonminority students.

In reaching this conclusion, the court hypothesized a number of alternatives that conceivably would have passed constitutional muster. The school could abolish its reliance on grades and test scores and adopt a program that measures true ability as measured by other criteria, such as professional goals, recommendations, character, and the needs of the profession and society. The school could institute aggressive programs to identify and recruit disadvantaged students of all races interested in pursuing a medical career and offer remedial schooling for such students.

The United States Supreme Court modified the California Supreme Court's judgment. In *Regents of University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733 (1978), a splintered Court held that although race could be one of the factors considered in a university's admissions program, the University of California's special admissions program was unlawful. Writing for the Court, Justice Powell noted that this case did not involve a judicial, legislative, or administrative finding of constitutional or statutory violations for which preferential treatment for the members of the injured group would be appropriate. *Regents of University of California v. Bakke,* 98 S.Ct. at 2758. Rather, in an effort to help certain groups who were perceived to be the victims of societal discrimination, the university had adopted a racial classification that deprived individuals of their constitutional rights.

The Court was quick to point out, however, that race could be one element in a range of factors that a university may consider in achieving the constitutionally permissible goal of attaining a diverse student body. The Court specifically held that a plan for achieving educational and student body diversity, wherein each applicant is treated as an individual but where race is a factor in some admission decisions is constitutional. *Regents of University of California v. Bakke,* 98 S.Ct. at 2762–63.

In *Weber,* the Court was confronted with a Title VII challenge to an affirmative action plan adopted pursuant to a master collective-bargaining agreement voluntarily entered into between the United Steelworkers of America and Kaiser Aluminum and Chemical Corporation. The agreement contained an affirmative action plan "which was designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craft work forces." *United Steelworkers of America v. Weber,* 99 S.Ct. at 2725. Black craft hiring goals were established for each Kaiser plant equal to the percentage of Blacks in the respective labor forces. To enable plants to meet these goals, on-the-job training programs were developed to teach both Black and white unskilled production workers the skills necessary to become craft workers. Although selection of craft trainees generally was made on the basis of seniority, the plan reserved for Black employees 50% of the openings in these newly created in-plant training programs. This program was to remain in effect until the percentage of Black skilled craft workers approximated the percentages of Blacks in the local labor force.

During 1974, 13 craft trainees were selected for participation in this program: 7 were Black and 6 were white. Because of the 50% requirement, several white production workers who had bid for admission were rejected in favor of less senior Blacks. Thereafter one of the white production workers instituted suit alleging violations of Title VII. The district court held that the affirmative action plan violated Title VII. The court of appeals agreed with this conclusion, holding that all employment preferences based on race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment.

The United States Supreme Court reversed this holding of the court of appeals. The Court was quick to point out the narrowness of its inquiry in the case, however.

> Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Constitution. Further, since the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proven violation of the Act. The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA Plan.

United Steelworkers of America v. Weber, 99 S.Ct. at 2726.

In upholding race-conscious affirmative action plans of the kind at issue in *Weber,* the Court relied heavily on the legislative history surrounding Title VII. An examination of this history demonstrated that Title VII was enacted in response to Congress's concern over "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (remarks of Sen. Humphrey). Blacks had historically been relegated to unskilled and semiskilled jobs and with the developments in automation the number of such jobs was decreasing. As a consequence, the unemployment rate of Blacks was increasing, and the relative position of the Black worker was worsening. Because of these facts it was apparent to Congress that the solution to this problem was to open employment opportunities for Blacks in occupations that had been traditionally closed to them. The Court noted that it was obvious from the House report accompanying the Civil Rights Act that Congress intended private and voluntary affirmative action efforts to play an important part in solving this problem. The report recognizes that if the federal legislation is to be effective, it must "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) at 18.

The Court concluded that the language of the act, which was intended "as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history,' [could not] be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges." *United Steelworkers of America v. Weber,* 99 S.Ct. at 2728 (footnotes and citations omitted).

In holding that Title VII does not condemn all private, voluntary, race-conscious affirmative action plans, the Court believed it was unnecessary to define in detail the distinctions between permissible and impermissible plans.

> It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."
>
> At the same time the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new Black hires. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the . . . plant will end as soon as the percentage of Black skilled craft workers in the . . . plant approximates the percentage of Blacks in the local labor force.

United Steelworkers of America v. Weber, 99 S.Ct. at 2730 (footnotes and citations omitted).

These cases indicate that special programs designed to aid formerly underrepresented groups in the achievement of equality in education can be instituted provided that the benefits of such programs are open to all, regardless of race or sex. *See Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1974).

Yet the issue may not be the same in the area of sex preferences as in the area of race preferences. Recently, the Supreme Court stated that gender-based classifications that have as their purpose the redressing of society's long-standing disparate treatment of women are both constitutional and laudable. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 457, n.6 (1976); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734 (1974); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572 (1975), (upholding as constitutional more stringent standards for promotion in the military for men than for women), and in *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978), the Court noted that "[g]ender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. . . . Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts." 98 S.Ct. at 2755. As a result, it can be argued that although racial classifications are forbidden, sexual classifications, adopted voluntarily to achieve affirmative action, may be both constitutional and laudable.

Section 86.3(c) requires a recipient education institution to have performed, no later than July 21, 1976, a self-evaluation of its policies and practices, which shall include the evaluation of the institution's policies, the modification of any identified policies that fail to meet the mandate of the regulation, and the remedying of the effects of any discrimination that may have resulted from adherence to these policies. Furthermore, the recipient is required, by section 86.3(d), to maintain on file for at least three years, a description of any modifications made to its programs and any remedial steps taken to remedy the effects of its previous practices.

§ 86.4 Assurance Required

(a) General. Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) Duration of obligation.

(1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) Form. The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

DISCUSSION

Section 86.4 provides that every application for federal financial assistance must contain an assurance on forms specified by the Director that the applicant will operate its education program in compliance with Title IX and its regulations. Such assurance must also include a commitment to take whatever remedial action is necessary (as recognized through the self-study provided for in section 86.3) to eliminate existing discrimination and its effects. The duration of this obligation will vary depending on the project that is being funded by the federal monies: realty, personal property, or the provision of other assistance. See subsections 86.4(b), (1), (2) and (3).

Similar provisions under Title VI have been declared to be consistent with the act. In *Gardner v. State of Alabama, Department of Pensions and Security*, 385 F.2d 804 (5th Cir. 1967), the court declared such assurances, as well as self-evaluations, "the standard federal-state arrangement by which the state qualifies for federal . . . assistance." *Gardner v. State of Alabama, Department of Pensions and Security*, 385 F.2d at 815. "The law is also clear that the grant of Federal assistance may be upon conditions *that are attached to the grant* and the *acceptance by the recipient* of the grant to which the conditions and stipulations are attached creates an obligation to perform the conditions on the part of the recipient." *United States v. Frazer*, 297 F. Supp. 319, 323 (D. Ala. 1968). Furthermore, in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1974), the Supreme Court upheld the reasonableness, *sub silentio*, of the requirement that a recipient take any measures necessary to effectuate the requirements of Title VI and its regulations. *Lau v. Nichols*, 414 U.S. at 570, 94 S.Ct. at 789.

The court in *Gardner* also discussed the legal impact of the assurance there at issue. The court concluded that the assurance is not a guarantee, but rather merely a commitment of the recipient to use its best efforts to eliminate discrimination. In addition, it obligates the recipient to assume the responsibility for taking reasonable steps to eliminate discrimination in the facilities and services provided by third parties. This does not mean that the recipient must become the enforcer of Title VI (or Title IX) as to third parties. All that is required is that the recipient, through negotiation and persuasion, attempt to change the blatantly discriminatory policies of third parties with whom it does business. If such efforts do not succeed, then the recipient is to seek alternate, acceptable services that are provided in a nondiscriminatory manner. *Gardner v. State of Alabama, Department of Pensions and Security*, 385 F.2d 804 (5th Cir. 1967).

§ 86.5 Transfers Of Property

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B.

DISCUSSION

Section 86.5 is intended to deal with the problem that arises when property, payed for in whole or in part by federal monies, is sold or transferred. Under this section, when such property is transferred and the "Federal share of the fair market value" is not accounted for to the federal government, then both the transferor and the transferee will be deemed to be recipients subject to the regulations and the act.

§ 86.6 Effect Of Other Requirements

(a) Effect of other Federal provisions. The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; Sections 799A and 845 of the Public Health Service Act (42 U.S.C. § 295h-9 and § 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*); the Equal Pay Act (29 U.S.C. § 206 and § 206(d)); and any other Act of Congress or Federal regulation.

(b) Effect Of State or local law or other requirements. The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) Effect of rules or regulations of private organizations. The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

DISCU[illegible]ON

Section 86.6 is concerned with the interplay between Title IX and other nondiscrimination mandates. Subpart (a) provides that the obligations imposed by Title IX are independent of and do not alter obligations imposed by other statutes and executive orders. This section is fully consistent with the clear holdings of the Supreme Court. In *International Union of Electrical Workers v. Robbins & Myers*, 429 U.S. 229, 97 S.Ct. 441 (1976), the Supreme Court held that the remedies created by the various civil rights acts are independent of each other and can be pursued separately or concurrently. *See also Alexander v. Gardner-Denver*, 415 U.S. 36, 94 S.Ct. 1011 (1974). As a result, an individual who complains of sex bias in employment can pursue both her Title VII and Title IX remedies. In addition, it is possible that practices may violate students' rights under Title IX and teacher's rights under Title VII. *See Harrington v. Vandalia-Butler Board of Education*, 418 F. Supp. 603 (S.D. Ohio 1976), rev'd on other grounds, 585 F.2d 192 (6th Cir. 1978), cert. denied, ___ U.S. ___, 99 S.Ct. 2053 (1979), where the court held that providing inferior gymnasium facilities to women students gives rise to unequal working conditions for the female teachers in violation of Title VII.

Subpart (b) provides that compliance with Title IX and its regulation cannot be avoided by relying on state or local laws, which may compel a different result. This provision adopts the concept, basic to constitutional law, that when federal legislation and state legislation have conflicting requirements, the Constitution requires that the federal act take precedence. In the area of civil rights, this principle has seen thorough consideration in cases arising under Title VII that involve state "protective laws" restricting the employment opportunities of women. Uniformly, the courts have concluded that in such instances, the state laws have been supplanted by Title VII. *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971); *Manning v. General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973).

Subpart (c) directs this concept of supremacy to conflicts caused by rules and regulations of private organizations. It provides that the obligation to comply with Title IX is not obviated by any rule or regulation of a private organization that mandates discrimination on the basis of sex. This is an *a fortiori* conclusion of subpart 86.6(b), and recognizes that two or more individuals cannot, through the adoption of a rule or regulation, invalidate the public policy represented by Title IX.

§86.7 Effect of Employment Opportunities

The obligation to comply with this Part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

DISCUSSION

Section 86.7 provides that recipients cannot avoid compliance with Title IX by relying on the fact (or assumption) that the employment opportunities in any occupation or profession are more limited for members of one sex than for the other. Therefore, recipients cannot, for example, refuse to train women in skilled trades merely because the opportunities for the employment of women in those trades may be limited. The regulation recognizes that such limitations are, for the most part, artificial and often result from customer preference and employer bias.

§ 86.8 Designation Of Responsible Employee and Adoption of Grievance Procedures

(a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

DISCUSSION

Section 86.8 is another requirement mandated by the regulation that has as its goal the facilitation of compliance and the prompt correction of complaints under Title IX without resort to the federal machinery. Under this provision each recipient is required to designate at least one employee to carry out and coordinate the compliance efforts required by the regulation. The designated employee will be responsible for investigating complaints of non-compliance in any of the recipient's programs. All students and employees are to be informed of the selected employee's name, office address, and telephone number. In furtherance of this provision, section 86.8(b) requires all recipients to adopt and publish grievance procedures that provide for the prompt and equitable resolution of both student and employee complaints under Title IX. If this procedure is to achieve its goal of avoiding unnecessary resort to the federal enforcement agencies, the grievance procedure will have to be well publicized and very prompt. This is especially so if the procedure is expected to deal realistically with problems of employment, covered not only by Title IX, but also by Title VII of the Civil Rights Act of 1964.

Title VII permits an employee who feels discriminated against in employment to file charges of discrimination with the Equal Employment Opportunity Commission within 180 days of the act of discrimination. If a Title IX grievance procedure is going to deter any Title VII filings, it will have to be developed with these time constraints in mind. A Title IX procedure that takes more than 180 days to complete may be bypassed by a grievant who is raising a claim cognizable under both Title IX and Title VII.

§ 86.9 Dissemination Of Policy

(a) Notification of policy.

(1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by Title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.8, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) Publications.

(1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) Distribution. Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

DISCUSSION

Section 86.9 adopts a method by which the individuals granted rights by Title IX can be informed of the existence of these rights. Consequently, each recipient is required to implement "specific and continuing" steps to notify applicants for admission and employment, students, parents, unions, professional organizations, and other designated individuals that the recipient does not and cannot, under Title IX, discriminate on the basis of sex in its education programs and activities. Such notification must at least state that the requirement of nondiscrimination extends to the recipient's employment practices, to its student programs, and to its admissions policies (unless otherwise exempt). In addition, the notice must provide that inquiries concerning Title IX can be referred to the employee appointed pursuant to section 86.8, or to the Director of the Office for Civil Rights.

The initial notification under section 86.9(a) was required to be made within 90 days of the effective date of the regulations (October 21, 1975) or within 90 days after the regulations first become applicable to a recipient. This notification was to have been published in local newspapers, newspapers operated by the recipient or in connection with the recipient, and memoranda distributed to every student and employee of such recipients.

Similar statements of nondiscrimination are required to be included in all announcements, bulletins, catalogs, and application forms that are made available to students, employees, or other individuals identified in section 86.9(a)(1).

This requirement of dissemination extends also to recruitment representatives of the recipient, who shall be apprised of the policy of nondiscrimination mandated by the regulations and required to adhere to such policy.

Subpart B — Coverage

Subpart B describes educational institutions that are subject to the regulation. In addition, it includes the exemptions as to the admission practices of certain institutions and organizations, as provided for in Title IX. The subpart also describes what a transition plan must contain for it to be acceptable to the United States Commissioner of Education.

§ 86.11 Application

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

DISCUSSION

Section 86.11 makes it clear that, unless a recipient is exempt under the provisions of subpart B, the requirements of the regulations apply to each education program or activity that is operated by that recipient, regardless of whether that activity actually receives direct federal grants. Case law under Title VI and Title IX have established almost uniformly that receipt of any federal financial assistance requires all of the recipient's programs to be available nondiscriminatorily. *See Bob Jones University v. Johnson,* 396 F. Supp. 597 (D.S.C. 1974), *aff'd sub nom. Bob Jones University v. Roudebush,* 529 F.2d 514 (4th Cir. 1975); *Brenden v. Independent School District 742,* 477 F.2d 1292 (8th Cir. 1973); *Cf. Cape v. Tennessee Secondary School Athletic Association,* 424 F. Supp. 732 (E.D. Tenn 1976); *Cannon v. University of Chicago,* 12 EPD ¶ 11175 (7th Cir. 1976). *But see Stewart v. New York,* 44 U.S.L.W. 2481 (S.D.N.Y 1975) (holding that the admission practices of a private university could not be challenged under both Title VI and Title IX because of the minimal federal financial assistance involved in the construction of a dormitory; *Romeo Community Schools v. United States Department of Health, Education and Welfare,* 438 F. Supp. 1021 (E.D. Mich. 1977) *aff'd* ____ F.2d ____ 19 FEP Cases 1720 (6th Cir. 1979) (concluding that the "program-specific" language of section 1682, which limits HEW's enforcement power, necessarily was a limitation on the scope of section 1681).

§ 86.12 Educational Institutions Controlled By Religious Organizations

(a) Application. This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) Exemption. An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

DISCUSSION

Section 86.12(a) merely restates the general statutory exemption found in Section 1681(a)(3). No similar exemption exists in Title VI. In fact, in *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd sub nom. Bob Jones University v. Roudebush*, 529 F.2d 514 (4th Cir 1975), it was argued by the university that its policy of not admitting blacks was religiously based and not subject to challenge under Title VI. The court, in dealing with this argument, stated that "[t]here is no judicial support for the . . . asserted principle that religiously based racism is immune from the prescriptions of constitutional law." *Bob Jones University v. Johnson*, 396 F. Supp. at 605, n. 28.

Section 86.12(b) provides the procedure by which an educational institution, wishing to claim this exemption, may do so. The claimant is required to submit in writing to the Director a statement from the highest ranking official of the institution, which identifies both the provisions of the regulations that create the conflict and the specific tenet of the religious organization that is being followed by the institution. This procedure is consistent with similar practices that relate to the claiming of tax exempt status by such religious institutions. *See* section 501(d) of Internal Revenue Code (1976).

§ 86.13 Military And Merchant Marine Educational Institutions

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

DISCUSSION

This provision merely restates the statutory exemption in section 1681(1)(4). However, this does not mean that the military academies of the United States can exclude women with impunity. In *Edwards v. Schlesinger*, 377 F. Supp. 1091 (D.C. 1974), suit was brought challenging as unconstitutional the failure of the United States Air Force Academy and the United States Naval Academy to consider women for appointment. The district court concluded that because women in the United States Armed Forces are not assigned to active combat roles, it was reasonable to limit the admission to these institutions to men. On appeal, this decision was reversed and remanded to the trial court for a more thorough analysis of the problem. 509 F.2d 508 (D.C. Cir. 1974). In so doing the court of appeals recognized that not all individuals who attend the academies are assigned to active combat roles. This being the case, the court was directed to consider the appropriateness of allowing women equal access to the academies only to the extent that they trained officers for noncombat roles.

§ 86.14 Membership Practices Of Certain Organizations

(a) Social fraternities and sororities. This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls. This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) Voluntary youth service organizations. This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

DISCUSSION

Section 86.14 merely restates the statutory exemptions that appear in section 1681(a)(6).

§ 86.15 Admissions

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) Administratively separate units. For the purposes only of this section, §§ 86.15 and 86.16, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) Application of Subpart C. Except as provided in paragraphs (c) and (d) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) Educational institutions. Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) Public institutions of undergraduate higher education. Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

DISCUSSION

Section 86.15 restates the provisions found in section 1681(a)(2) and (5). As provided for in the act, the admissions policies of all educational institutions were exempt from coverage until June 23, 1973, one year after the enactment of Title IX.

Section 86.15(c) provides that those institutions not exempt as to admissions by the act are covered for all purposes and that any institution covered by subpart C of the regulation shall not discriminate on the basis of sex in its admission or recruitment policies.

Section 86.15(d), in conjunction with section 86.15(c), restates the statutory requirements of section 1681(a)(1).

Section 86.15(e) restates the statutory exemption as to admissions that public institutions of undergraduate higher education were granted by section 1681(a)(5).

§ 86.16 Educational Institutions Eligible To Submit Transition Plans

(a) Application. This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) Provision for transition plans. An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

DISCUSSION

Sections 86.16 and 86.17, relating to the submission of transition plans, will affect relatively few institutions. Section 86.16 describes the institutions subject to subpart C of the regulation, which are eligible to submit such plans. Subpart 86.16(b) provides that if an educational institution that is eligible to submit a transition plan fails to do so as described in Section 86.17, then that educational institution must not discriminate on the basis of sex in admission or recruitment to its program of study.

§ 86.17 Transition Plans

(a) Submission of plans. An institution to which § 86.15 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) Content of plans. In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) Nondiscrimination. No policy or practice of a recipient to which § 86.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) Effects of past exclusion. To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

DISCUSSION

Section 86.17 details what a transition plan must contain to be approved by the United States Commissioner of Education. Such plans must be submitted by the chief administrator or president of the institution or another individual authorized to bind the institution, must state whether the institution admits students of both sexes, must identify any obstacles to admitting students without discrimination on the basis of sex, and must describe in detail the steps necessary to eliminate each such obstacle so identified. A schedule must be devised for the eradication of obstacles to achieving coeducation.

Section 86.17 provides that the institution operating under a transition plan may not treat students differently on the basis of sex in its admissions program unless such treatment is necessitated by an obstacle that was identified in the transition plan and a schedule for eliminating that obstacle has been developed.

Section 86.17(d) imposes on institutions submitting transition plans the duty to take affirmative steps to encourage individuals previously excluded from the institution because of their sex to apply for admission to such institution.

Subpart C – Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

Subpart C sets forth the prohibitions, both general and specific, in the area of admissions and recruitment.

§ 86.21 Admission

(a) General. No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.16 and 86.17.

(b) Specific prohibitions.

(1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

DISCUSSION

Section 86.21 contains the prohibitions relating to the admission practices of institutions covered by the act. For a discussion of those institutions covered by Title IX, *see* TITLE IX: THE STATUTE, Section-By-Section Analysis, *supra* at 21. It does not cover institutions going through transition as provided for by sections 86.16 and 86.17.

Section 86.21(b) lists the specific practices prohibited by the regulation. They include not only facially discriminatory practices—applying different standards for admission to the sexes—but also practices that may appear neutral, but which have a disparate impact on one of the sexes. The regulation does not, of course, prohibit educational institutions from using policies or criteria for admission, but merely requires that whatever standards are used, they be nondiscriminatory on the basis of sex.

Sections 86.21(b)(1)(i) and (ii) prohibit the ranking of applicants separately on the basis of sex to give preference to individuals of one sex over another, and the application of numerical limitations on the number of persons of either sex who may be admitted. Practices of this kind were the subject of litigation in *Berkelman v. San Francisco Unified School District,* 501 F.2d 1264 (9th Cir. 1974), and *Bray v. Lee,* 337 F. Supp. 934 (D. Mass. 1972). In *Berkelman,* female students who sought entry to one of the school district's comprehensive, college-preparatory high schools challenged as unconstitutional the application of higher admission requirements for girls (3.25 average) than for boys (3.0 average). The school district asserted that the policy was designed to produce an equal distribution of boys and girls at the school. Although the court noted that section 1681 did not extend to the admission practices of public secondary schools (§ 1681(a)(1)), it concluded that this omission "indicates nothing more than that Congress did not know the manner, extent, or rationale of separate education below the college level, and could not anticipate the effect of a prohibition upon such single-sex schools," *Berkelman v. San Francisco Unified School District,* 501 F.2d at 1269, and held that the grouping of applicants by sex and use of higher admission standards for female than for male applicants violated the Equal Protection Clause of the Fourteenth Amendment.

Similarly, the Court in *Bray* concluded that the use of separate and different standards for admission of boys and girls to the sex-segregated Boston Latin Schools constituted a violation of the Constitution. (For a further discussion, *see* THE STATUTE, Section-By-Section Analysis, § 1681.)

Section 86.21(b)(2) prohibits a recipient from using any test or criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless such test has been shown to predict validly success in the education program, and no alternative test, which does not have such an impact, is available. This provision merely restates the principle, announced by the Supreme Court in the employment context, that "practices which are fair in form, but discriminatory in operation," are invalid unless they can be shown to be valid predictors of success in the program and that no less onerous means exists to select those persons who can succeed. *Griggs v. Duke Power Co.*, 410 U.S. 424, 91 S.Ct. 849 (1971). For further discussion of the *Griggs* principle, *see* THE CONCEPT OF DISCRIMINATION, The Reality, *supra* at 14.

Section 86.21(c) prohibits a recipient from making its decisions on admission based on sex-differentiated standards related to marital or parental status. Section 86.21(c)(1) requires that any rule used by an institution that considers the actual or potential parental status of an applicant or student relevant must be applied to all students, without regard to the sex of the applicant. Thus a school could not exclude from consideration for admission women who plan to become mothers and at the same time admit men who plan to become fathers. Section 86.21(c)(2) recognizes that if a recipient should apply a standard for admission that uses pregnancy or pregnancy-related matters as an exclusionary device, such a standard is the functional equivalent of sex and, therefore, is prohibited. Similarly, use of any characteristic unique to one sex as a standard for admission will be in violation of this regulation. Although there have been no reported cases dealing with admission policies that use sex-linked characteristics (e.g., pregnancy), numerous cases have arisen that penalize students and teachers in the enjoyment of education and the right to employment. These cases are discussed under § 86.40 as to students and § 86.57 as to teachers.

Section 86.21(c)(4) prohibits any preadmission inquiry as to the marital status of an applicant. Therefore, requesting that applicants designate Mr., Ms., Miss, and Mrs. will result in a violation of this section of the regulations. This section also provides that any inquiry into the sex of an applicant must be pursuant to a rule, not only equally applied, but neutral in its effect. Such inquiry cannot, however, be used to achieve an otherwise prohibited end.

§ 86.22 Preference In Admission

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominatly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

DISCUSSION

Section 86.22 provides that a recipient shall not give preference to applicants for admission because such applicants attended any institution or entity that limits its enrollment totally or predominantly to students of one sex, if the result of this practice would be to discriminate on the basis of sex. This regulation merely recognizes that it is not sufficient for an institution to abandon facially discriminatory policies if as their replacement the institution adopts the discriminatory policies of a third party, whether that party is an educational institution or another "entity."

A developing problem in this area may result from the policy of some institutions to give admissions preference to veterans. Because less than 2% of the veterans in the United States are women (resulting from a congressionally imposed quota), such a practice could have the effect of discrimination based on sex. Just such a question has been raised in the public employment sphere. In *Feeney v. Commonwealth of Massachusetts,* 451 F. Supp. 143 (D. Mass. 1978), *rev'd sub nom. Personnel Administrator of Massachusetts v. Feeney,* ___ U.S. ___, 99, S.Ct. 2282 (1979), a three-judge court declared that the Massachusetts veteran's preference statute granting preference in public employment violates the Equal Protection Clause of the Fourteenth Amendment. Although the court concluded that the statute was not facially discriminatory, it did find that it was not impartial or neutral because of its impact on the opportunities of women. Persuasive to the court was that the statute effectively tied women's employment opportunities to the discriminatory admission standards of the Armed Forces, and that service in the military bore no demonstrable relationship for civilian public service.

The Supreme Court disagreed. The Court reiterated its earlier holdings that when a neutral law has a disparate impact on a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. However, a mere showing of disparate impact, no matter how severe, does not end the inquiry but is rather the starting point for the application of a two-fold test. "The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination." *Personnel Administrator of Massachusetts v. Feeney,* ___ U.S. ___, 99 S.Ct. at 2293.

Applying this test to the facts before it, the Court concluded that the Massachusetts scheme was not unconstitutional. "[N]othing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service." *Personnel Administrator of Massachusetts v. Feeney,* ___ U.S. ___, 99 Sc. Ct. at 2296.

§ 86.23 Recruitment

(a) Nondiscriminatory recruitment. A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) Recruitment at certain institutions. A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

DISCUSSION

Section 86.23, covering recruitment and admissions, provides that recipients shall not discriminate on the basis of sex in recruitment or admissions. Because the two are clearly linked, the regulation covers the recruitment efforts of the institutions, realizing that nondiscriminatory admission policies will be ineffective if, through the recruitment process, the pool of applicants is predominantly one sex.

An example of this interrelationship is presented by *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962). In *Meredith*, the plaintiff was seeking admission to the all-white University of Mississippi. One of the policies used by the university as part of its admissions procedure was the requirement that all applicants for admission furnish alumni certificates relating to the applicant's moral character. There had never been a Black graduate of the University of Mississippi. The Black plaintiff/applicant was unable to meet this condition. The court declared the policy of the university to be unconsitutional as it effectively barred all qualified Black students from admission, although imposing no burden on qualified white students. Furthermore, because of traditional social barriers, the court found it unlikely, if not impossible, that any Black would receive the requisite number of recommendations for admission. This limitation amounted to discrimination not only in admissions, but in recruitment as well.

Section 86.23 also recognizes that institutions that follow their traditional modes of recruiting students may violate Title IX. As a consequence, in a vein similar to that taken in section 86.22, institutions are prohibited, by section 86.23(b), from recruiting primarily or exclusively at institutions or entities that are solely or predominantly members of one sex if such actions result in discrimination. This is not to say that institutions may never recruit at single-sex institutions. If they do so, however, they will have to be certain that an effort is made to minimize the effect of the recruiting on their pool of applicants. Thus section 86.23(a) provides that an institution may adopt practices intended to overcome the discriminatory effects of its previous recruitment efforts (pursuant to section 86.3(a)), or pursuant to section 86.3(b), it may choose to make such special efforts as a form of affirmative action. These efforts can include recruitment programs directed at interesting the formerly underrepresented sex in the institution, and programs intended to make the institution's education offerings broader in scope to draw more applicants of the underrepresented sex. *See Regents of The University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978).

Subpart D — Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

Subpart D contains the general rules covering educational programs and activities. They cover all programs, including academic, research, and extracurricular activities; housing; facilities; course offerings; counseling; financial assistance; employment opportunities of students; health services; and athletics. The regulation does not cover the use of particular textbooks. Consistent throughout the subpart is the belief that all educational institutions receiving federal financial assistance, including those exempt as to admissions, must provide all students an equal opportunity to benefit from and participate in all programs and activities sponsored or offered by the recipient. As a consequence, where it seems that the mere extension of existing programs to women may not result in equity, the regulation requires additional considerations to guarantee equal educational opportunities.

§ 86.31 Education Programs And Activities

(a) General. Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage or opportunity.

(c) Assistance administered by a recipient educational institution to study at a foreign institution. A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) Programs not operated by recipient.

(1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

DISCUSSION

Section 86.31 contains the general and specific prohibitions relating to the treatment of students in education programs and activities. Section 86.31(a) particularizes the general statements concerning coverage found in the statute and in section 86.11 of the regulations. It is here made clear that education programs are intended to include extracurricular activities. As the court said in *Davis v. Meek*, 344 F. Supp. 298, 32 Ohio Misc. 43 (N.D. Ohio 1972), "extracurricular activities are, in the best modern thinking, an integral and complementary part of the total school program. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)." *See also Cordova v. Chonke*, 315 F. Supp. 953 (N.D. Ohio 1969). Furthermore, this section points out that although the admission policies of certain institutions may be exempt from the act, the institutions' programs offered after admission must be available on a nondiscriminatory basis.

Section 86.31(b) contains categories of specific prohibitions relating to the provision of any aid, benefit, or service to a student. Expressly prohibited are practices that are based on sex and apply differing standards for determining eligibility for any aid, benefit, or service. *Cf. Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974), (denying such aid, benefit or service, or providing such aid, benefits, or services in a different manner). As the court concluded in *Gardner v. State of Alabama, Department of Pensions and Security*, 385 F.2d 804 (5th Cir. 1967), compliance with Title VI cannot be met by providing separate health care facilities, equally funded, but segregated on the basis of race. "[The] discrimination prohibited by [Title VI] surely includes the practice of providing services to Negroes and whites on a separate but equal basis solely on the basis of race." *Gardner v. State of Alabama, Department of Pensions and Security,* 385 F.2d at 816.

Furthermore, Section 86.31(b) prohibits the application of separate rules of behavior, sanctions, and appearance to individuals based on sex. The only case to date to discuss the scope of this portion of the regulation is *Trent v. Perritt,* 391 F. Supp. 171 (S.D. Miss. 1975). In *Trent,* a male high school student sought to challenge under Title IX the school grooming regulation that prohibited male students from wearing hair below the earlobe or over the collar. The court concluded that although such a regulation does treat boy's hair differently from girl's hair, this is not discrimination within the purview of Title IX and Section 86.31 of the regulations:

> Without going into the Congressional history of this section it is quite plain, in the growing awareness of women's emergence in every day life to a status compatible with that of men, that Congress intends federal financial assistance to be available to girls as much as to boys under any education program or activity. This does not require that the recipient erase all differences between the sexes. If the word "appearance" in the . . . HEW regulations . . . means grooming and proposes to erase all outside physical distinctions between the sexes, it aims at a ridiculous result, one of stereotyping both sexes into one, with little relation to the purpose of the federal funding.

Section 86.31(b)(6) relates to rules concerning domicile or residence for purposes of instate tuition and fees, requiring such rules to be nondiscriminatory in application. This result also has been mandated under the Constitution. In *Samuel v. University of Pittsburgh,* 375 F. Supp. 1119 (W.D. Pa. 1974), married female students challenged a rule providing that the domicile of a wife was presumed to be that of her husband. Although this presumption could be rebutted, only married women were subject to this procedure. Thus, the school presumed that a woman married to an out-of-state resident is herself an out-of-state resident, but a man married to an out-of-state resident was not presumed to be an out-of-state resident. In ruling on the allegation of sex discrimination, the court found that the rules as administered and promulgated were violative of the equal protection clause of the Fourteenth Amendment and, therefore, were void and unenforceable.

Section 86.31(b)(7) concludes that the provision by a recipient of significant assistance to any agency, organization, or person that discriminates on the basis of sex perpetuates or aids discrimination in violation of Title IX. Exempt from this section's coverage are organizations and activities that were the subject of the 1976 amendments to Title IX—Boys State and Girls State. In a letter to the National Federation of Business and Professional Women's Clubs, former Director Gerry provided examples "in which the interrelationship of an organization and a school is such that discriminatory policies and practices of the organizations can be attributed to the school":

1. providing meeting rooms only to student groups that meet certain standards and are recognized
2. making available the school's mail service
3. providing space in the catalog
4. making available free or discounted computer time
5. providing special recognition for members
6. providing or requiring a faculty sponsor

(as reported in *On Campus With Women,* Number 14, June 1976, the newsletter of the Project on the Status and Education of Women of the Association of American Colleges).

Section 86.31(c) permits educational institutions to administer sex-restricted scholarships that are established by a foreign or domestic will, trust, or other legal instrument, and that are awarded to students already matriculating at or who are graduates of the recipient, provided that the recipient institution makes available reasonable opportunities for similar awards for members of the other sex.

Section 86.31(d) is directed at the participation of a recipient in a cooperative venture with a third party that may result in discrimination based on sex. Institutions that require or permit students and employees to participate for credit in programs not directly operated by that institution must develop a procedure for assuring itself that this other program is not operated in a manner which, if done by the recipient, would violate Title IX. If a recipient discovers that such program is being operated in a discriminatory manner, it must no longer participate in such activity.

§ 86.32 Housing

(a) Generally. A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) Housing provided by recipient.

(1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) Other housing.

(1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

DISCUSSION

Section 86.32 implements section 1681 within the constraints of section 1686. Although section 1686 provides that coeducational housing is not required by the act, it does not *exempt* all living facilities from the act's coverage. Housing, if provided, must be equally accessible to both sexes and comparable in quality and cost.

Section 86.32(a) is the general prohibitory section and requires that recipients treat their beneficiaries (students) without sex bias in the area of housing. As a result, recipients are not, on the basis of sex, to adopt varying rules or regulations (e.g., rules regarding curfew hours), impose different fees or requirements, or offer different services or benefits related to housing (e.g., housekeeping services).

Although no cases are reported that arise under Title IX in the area of housing, numerous housing cases have been litigated that raise constitutional issues. Several of these cases concern only the question of whether or not an educational institution can, within the confines of the constitution, impose rules and regulations governing all students. In general, it has been established that as long as the regulation is rationally related to some legitimate state interest, it is constitutional. *Pratz v. Louisiana Polytechnic Institute,* 316 F. Supp. 872 (W.D. La. 1970), *aff'd,* 401 U.S. 1004, 91 S.Ct. 1252 (1971) (rule requiring residence in dormitories for all students held reasonable); *Poynter v. Dreydahl,* 359 F. Supp. 1137 (W.D. Mich. 1972) (rule requiring all single undergraduate students to live in residence hall upheld); *Prostrollo v. University of South Dakota,* 507 F.2d 775 (8th Cir. 1974) (university can require all freshman and sophomores to live in university housing); *Bynes v. Toll,* 512 F.2d 252 (2nd Cir. 1975) (university can limit married students' suites to students without children because of potential fire hazard).

Where the regulations cover only students of one sex, however, the courts have not been so quick to uphold their validity. In *Mollere v. Southeastern Louisiana College,* 304 F. Supp. 826 (E.D. La. 1969), the court concluded that requiring unmarried women students under 21 years of age who were not living with their parents or with a close relative to live in residence halls was to make the kind of irrational choice prohibited by the Constitution. The sole justification established for the rule in *Mollere* was to increase the revenues of the housing system of the university. The court found this lacking in its search for a special educational consideration that would sustain the rule.

However, a contrary result was reached in *Robinson v. Board of Regents of Eastern Kentucky University,* 475 F.2d 707 (6th Cir. 1973), *cert. denied,* 416 U.S. 982, 94 S.Ct. 2382 (1974). At Eastern Kentucky enrolled women were required to be in their dormitories by 10:30 p.m. on week nights during their freshman year. During their second, third, and fourth years, women had their hours unrestricted if they met three conditions: (1) "C" average in all academic work, (2) $15.00 fee per semester, and (3) written consent from her parents. At no time during this period were there hour restrictions on the male students enrolled at Eastern Kentucky University.

The plaintiff, a female student, alleged that the university's rules violated her right to equal protection in that it imposed burdens only on women students. Applying the traditional test of equal protection (*See,* THE CONCEPT OF DISCRIMINATION, *supra* at 13), the court looked merely for a conceivable rational relationship between the rule and a reasonable goal of the university. Concluding that "the safety of women will be protected by having them in their dormitories at certain hours of the night" and noting that later hours on weekends could be justified by "the fact that on weekend nights many coeds have dates and ought to be permitted to stay out later than on weekday nights," the court upheld the constitutionality of the rule. It must be noted, however, that the court applied as its measure of constitutionality a test disapproved in sex discrimination cases. Today, classifications on the basis of sex must be more than just conceivably rational, but at least must be proven to be substantially related to important governmental objectives rather than based on "old notions" and 'archaic and overbroad" generalizations about women as a class. *See Craig v. Boren,* 429 U.S. 190, 97 S Ct. 451 (1976). Section 86.32(a) of the regulation would mandate a result contrary to that reached by the court and, indeed, under the new test of equal protection, the rule's validity may be questioned as reflecting old stereotypical notions about the needs of the sexes and adopting an inaccurate proxy for another, more germane basis of classification.

In a more recent case, *Texas Woman's University, v. Chayklintaste* (Court of Civil Appeals of Texas, reported in *On Campus with Women,* Number 14, June 1976, p. 5), female students, who were required to reside on campus while male students were permitted to live off campus, alleged that the rule violated their civil rights. The court noted that the rule was adopted when men were admitted to the formerly all-female university a few years before suit. This influx posed a question as to the adequacy of on-campus housing facilities for the two sexes. Requiring women to reside on campus, and permitting men to live off campus was not the answer, however. The court stated that "if facilities are provided, substantial equity of treatment of persons . . . under like conditions cannot be refused." Therefore, the rule was held to violate the Equal Protection Clause of the Fourteenth Amendment, as well as the Texas Constitution.

The *Texas Woman's University* case indicates merely a portion of the kind of equity mandated by the regulations. Section 86.32(b) provides further that if sex-segregated housing is offered, that housing must be equally available to females and males (in proportion to the number of students of each sex enrolled at the institution applying for such housing), and must be comparable in quality and cost.

Section 86.32(c) provides that those institutions that permit off-campus housing shall not adopt differing policies and practices based on sex, such as those in dispute in *Texas Woman's University.* In addition, if the institution provides a "housing bureau" that lists available housing in the community, it must assure itself that such housing is provided in a nondiscriminatory manner and in compliance with the regulation. Although the institution can assist an agency that provides housing to students of only one sex, it must also make certain that the total housing is proportionately available and comparable in quality and cost to students of each sex.

Furthermore, in 1974 Congress amended Title VIII of the Civil Rights Act of 1968, Title 42 U.S.C. section 3604, so as to prohibit discrimination on the basis of sex in the sale, rental, and financing of housing.

§ 86.33 Comparable Facilities

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

DISCUSSION

Section 86.33 recognizes that the individual right to privacy can form the basis for the provision of separate facilities in situations that involve disrobing or the performing of certain personal bodily functions. In these situations, the recipient may provide separate facilities, provided that the facilities available to students of one sex are comparable to those available to the students of the other sex. Also, as in the housing provision, section 86.32, the regulation does not mandate sex-segregated facilities; it merely permits them.

§ 86.34 Access To Course Offerings

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible, but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

DISCUSSION

Section 86.34 provides that all courses of study offered by a recipient (including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education) must be offered on a coeducational basis, and no person shall be denied access to any course offering based upon sex. The section is all inclusive, and only in those areas that relate to safety (section 86.34(c)) and privacy (section 86.34(e)) are alternatives provided. In addition, Congress, in the Education Amendments of 1976, established a new chapter relating to vocational education that requires states that wish to participate in the federally funded vocational education programs to recognize and deal with the problems of sex-bias in vocational education. Under the act, each state must allocate $50,000 per year to support full-time personnel and activities designed to reduce sex stereotyping, remove recognized sex bias, address the interests and needs of women, assist local educational agencies in improving vocational education opportunities for women, and overcome sex stereotyping and sex bias in vocational education programs statewide. Title 20 U.S.C. § 2304.

The six subparts of section 86.34 are intended to explain the general language of the regulation or to recognize certain considerations involved in the implementation of the regulation's prohibitions.

Section 86.34(a) contains the "phase-in" provisions of the regulation relative to classes in physical education. In all elementary schools, compliance is to be as expeditious as possible, but in no event later than one year from the effective date of the regulation. Thus coeducation in physical education classes in all elementary schools should have been achieved as of July 21, 1976.

Physical education classes in the secondary and post-secondary levels must also have complied as expeditiously as possible. However these schools were given three years from the effective date of the regulation (i.e., until July 21, 1978), within which to be in full compliance with the act. It must be understood that, although often termed a "grace period," the time allowed for compliance does not mean the blatant violations of the act were sanctioned during this period. All institutions must have been working toward compliance expeditiously. The regulation does not permit schools to wait until the end of the three-year period to start a compliance effort. As former Secretary Weinberger said in the introductory memorandum accompanying the regulation, these periods were permitted "because of the existence of wide skill differentials attributable to the traditionally lower levels of training available to girls in many schools." 40 Fed. Reg. p. 24132 (June 4, 1975). They were not intended as "one last fling" for the recipient institutions.

It must also be remembered that most recipients, by virtue of their being public institutions, will also be operating under the constraints of the Fourteenth Amendment's Equal Protection Clause (as well as other statutes), the provisions of which know no waiting period. *See* THE IMPLEMENTING REGULATION, Section-by-Section Analysis, § 86.41.

Section 86.34(b) permits recipients to group students in physical education classes by ability, provided such measure of ability is based on objective standards of *individual* (not group) performance that are developed and applied without regard to sex. In conjunction with this provision is section 86.34(d), which applies the *Griggs* concept of discrimination *(See* THE CONCEPT OF DISCRIMINATION, The Reality, *supra* at 14) to the area of physical education classes. Furthermore, where the use of a single standard to measure either skill or progress in physical education class has an adverse effect on members of one sex, the recipient is to adopt alternative and appropriate standards that do not have such effects. "For example, if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex. Accordingly, the appropriate standard might be an individual chart based on the number of push-ups which might be expected of that individual." 40 Fed. Reg. p. 24132 (June 4, 1975).

A comparable but more far-reaching approach to this matter has developed in the desegregation area. In *Lemon v. Bossier Parish School Board,* 444 F.2d 1400 (5th

Cir. 1971), the Fifth Circuit Court of Appeals was asked to review the appropriateness of a desegregation plan that the district court had approved. Under that plan, students in grades 4 through 12 were assigned to separate schools on the basis of scores made on the California Achievement Test. The result of this procedure was to reinstitute racial segregation. The court noted that it had "repeatedly rejected testing as a basis for student assignment" following the disestablishment of a dual school system, *Lemon v. Bossier Parish School Board*, 444 F.2d at 1401, regardless of the validity of the test per se. The court further held that testing could not be used until a school system was established as a unitary one. This was interpreted to mean that it had operated as a unitary system for several years.

Similarly, the court in *Dove v. Parham*, 282 F.2d 256 (5th Cir. 1960) said that "standards of placement cannot be devised or given application to preserve an existing system of imposed segregation. Nor can educational principles or theories serve to justify such a result." *Dove v. Parham*, 282 F.2d at 258. In addition, this obligation to convert to a truly unitary system is not complete until classrooms, as well as school buildings, are desegregated.

> We think it manifestly clear that the decisions of the Supreme Court and this court required the elimination of not only segregated schools, but also segregated classrooms within the schools.

Johnson v. Jackson Parish School Board, 423 F.2d 1055, 1056 (5th Cir. 1969).

The rationale of these cases mandates a joint analysis of Section 86.34(b) and (d). If the application of uniform ability tests to recently sex-integrated physical education classes results in sexually identifiable grouping, those ability tests should be reexamined. Furthermore, this method of grouping could be barred

> Until the district has operated as a unitary system without such [racial] assignments for a sufficient period of time to assure that the underachievements of the slower groups is not due to yesterday's educational disparities. Such a bar period may be lifted when the district can show that steps taken to bring disadvantaged students to peer status have ended the educational disadvantages caused by prior segregation.

McNeal v. Tate County School District, 508 F.2d 1017, 1020-1021 (5th Cir. 1975).

Section 86.34(c) declares that Title IX does not prohibit the separation of students by sex in physical education classes during participation in those sports or activities which involve, as a major activity, bodily contact. The regulation also makes it clear, however, that sex-segregation in these sports is not mandatory. This decision is left to each individual recipient.

However there is no provision of Title IX that expressly permits this interpretation regarding permissible separation of students by sex. The statute clearly prohibits sex discrimination in all programs or activities subject only to the limitations appearing in the separate exclusionary provisions of the act. *See* TITLE IX: THE STATUTE, Section-By-Section Analysis, § 1681. As a consequence, this portion of the regulation could be considered to be inconsistent with the statute from which it derives its authority in that it purports to exclude from the act's coverage an activity not expressly excluded. In addition, it may sanction activity that conflicts with the Constitution, in which event this portion of the regulation would be void and unenforceable. *See* THE IMPLEMENTING REGULATION, Section-By-Section Analysis, § 86.41.

Section 86.34(e) permits recipients to separate boys and girls in elementary and secondary schools for the portions of classes that deal exclusively with human sexuality. Although some confusion has arisen concerning this regulation, it does not require that courses in sex education be offered by any recipient. It merely provides to recipients who do offer such classes the option of choosing sex-segregated classes.

Section 86.34(f), although concerned with choruses, actually demonstrates the *Griggs* nondiscrimination theory at work. Prohibited by Title IX is the deliberate establishment of male-only/female-only choruses. The regulation recognizes, however, that there is educational value in choruses that have as their basis a limited vocal range. Thus the regulation permits (and the Office of Civil Rights has sanctioned) the use of vocal range or quality to select participants in a chorus or choruses, even if the result is that the membership of that chorus will be predominantly one sex.

§ 86.35 Access To Schools Operated By L.E.A.'s

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

DISCUSSION

Section 86.35 further clarifies section 1681 of the Act as its provisions relate to elementary and secondary institutions. The statute does not cover the admission policies of public elementary or secondary schools (local educational agencies); however, it does cover the admission policies of all institutions of vocational education. This provision of the regulation further clarifies this to provide that no person is to be excluded from participating in any institution of vocational education, including those operated by local educational agencies. Furthermore, those local educational agencies that continue to offer sex-segregated schools must make certain that students of one sex are offered, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered to students of the other sex.

§ 86.36 Counseling And Use Of Appraisal And Counseling Materials

(a) Counseling. A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) Use of appraisal and counseling materials. A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) Disproportion in classes. Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

DISCUSSION

Section 86.36 concerns itself with the counseling process, both pre- and postadmission. Subpart 86.36(a) prohibits discrimination in the counseling and guidance of both students and applicants for admission.

Subpart (b) concerns itself with materials that are generally used in the counseling process. Recipients that use testing or other appraisal materials in counseling students are prohibited from using different materials on the basis of sex or to use materials that permit or require different treatment of students on such basis. However, in the event a recipient can demonstrate that such materials cover the same occupations and interest areas for both sexes and that the materials are essential to the elimination of sex bias, such materials can be used. Thus materials intended to overcome the present effects of past discrimination may be used in the counseling process. *See Kahn v. Shevin,* 416 U.S. 351, 94 S.Ct. 1734 (1974); *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572 (1975); THE IMPLEMENTING REGULATION, Section-By-Section Analysis, § 86.3.

Furthermore, recipients are to develop and use internal procedures to make certain that the materials that are used in their institutions do not discriminate on the basis of sex. This requirement of self-analysis is independent of that provided for in § 86.3(c).

The last sentences of section 86.36(b) and section 86.36(c) contain the same general mandate. In the event a recipient finds that the use of a counseling test or other instrument results in the grouping of members of one sex in a particular course of study or classification, the recipient must take action to assure itself that such grouping is not the result of discrimination on the basis of sex, either in the materials themselves or on the part of the counselors. Where such grouping is occuring as a result of a recipient's testing procedures, the considerations, discussed *supra* THE IMPLEMENTING REGULATION, Section-By-Section Analysis, § 86.34(b) and (d), will become relevant to the questions of whether such tests can continue to be used.

§ 86.37 Financial Assistance

(a) General. Except as provided in paragraphs (b), (c) and (d) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) Financial aid established by certain legal instruments.

(1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this paragraph, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under subparagraph (b)(2)(i) of this paragraph because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) Athletic scholarships.

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41 of this part.

DISCUSSION

Section 86.37 concerns the nondiscriminatory provision of financial assistance. Subpart 86.37(a) contains the general prohibitions relating to the award of such assistance. Subpart (a)(1) prohibits a recipient from limiting the availability of financial assistance for members of one sex, either by applying differing criteria for eligibility, by limiting the availability of certain kinds of aid only to persons of a particular sex, or in any other way that discriminates on the basis of sex in the provision of financial assistance.

Subpart (a)(2) prohibits a recipient from providing assistance to any person or organization that discriminates in awarding financial assistance. Conceptually, the regulation adopts the general approach that a recipient cannot do indirectly that which it is prohibited from doing directly. *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974) *aff'd sub nom. Bob Jones University v. Roudebush*, 529 F.2d 514 (5th Cir. 1975).

Subpart (a)(3) further clarifies subpart (a)(1) to make it clear that any rule concerning eligibility for financial assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status is prohibited by Title IX.

Subpart (b) sets forth the conditions under which recipients may administer sex-restricted scholarships. Subpart (b)(1) states the general rule that a recipient may participate in the administration of certain kinds of financial assistance that are established pursuant to a domestic or foreign will, trust, bequest or similar legal instrument that requires that the financial assistance be made to members of a particular sex, provided that the overall effect of such participation does not result in discrimination on the basis of sex.

Subpart (b)(2) provides the means by which a recipient can determine whether or not its participation in sexually restrictive wills or trusts has the overall effect of discriminating on the basis of sex. The procedure is essentially a three-step one. First, a recipient is to select and rank the students who are entitled to financial assistance. This selection and ranking process must be on the basis of nondiscriminatory criteria, however, and not on the basis of the availability of funds that are restricted to members of a particular sex.

Following this identification stage, the recipient is to distribute and allocate the available financial assistance (including sex-restricted awards), at which time the recipient can take into consideration the sex of the student. If after this allocation there are students who were identified by the recipient as entitled to financial aid, but who were denied such an award because there is no financial assistance designated for students of that sex, then the recipient's participation in those trusts and wills has the overall effect of discrimination on the basis of sex.

An example of how this process is contemplated to work appears in the Secretary's memorandum accompanying the regulation:

> For example, if fifty students are selected by a university to receive financial assistance, the students should be ranked in the order in which they are to receive awards. If award is based on need, those most in need are placed at the top of the list; if award is based on academic excellence, those with the higher academic averages are placed at the top of the list. The list should then be given to the financial aid office which may match the students to the scholarships and other aid available, whether sex-restrictive or not. However, if after the first twenty students have been matched with funds, the financial aid office runs out of non-restrictive funds and is left with only funds designated for men, these funds must

> be awarded without regard to sex and not solely to men unless only men are left on the list. If both men and women remain on the list, the university must locate additional funds for the women or cease to give awards at that point.

40 Fed. Reg. p. 24133 (June 4, 1975).

This interpretation seems to be, to some degree, contradictory to the regulation. Section 86.37(b)(2)(iii) provides that no student is to be denied the award for which he or she was selected because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex. If an institution "cease[s] to give awards" because there are no monies available to students of one sex or the other, it would seem that the institution is denying a student an, award in violation of the express language of section 86.37(b)(2)(iii). Thus it would seem that the more consistent approach would be for the institution to find additional funds to meet the needs of all students who have been identified as entitled to financial assistance.

Section 86.37(c) covers the conditions under which athletic scholarships may be awarded. Recipients can award athletic scholarships provided there are reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex who participate in interscholastic or intercollegiate athletics. In addition, sex-separate athletic scholarships may be provided as a part of the separate athletic teams for members of each sex provided for in section 86.41 of the regulations.

A final provision, not included in the regulations but made a part of the 1976 amendments to Title IX, exempts scholarships or financial assistance that is awarded by an institution of higher education to an individual as an award in a pageant in which attainment of the award is based on factors relating to personal appearance, poise, and talent and in which participation is limited to individuals of only one sex.

§ 86.38 Employment Assistance To Students

(a) Assistance by recipient in making available outside employment. A recipient which assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) Employment of students by recipients. A recipient which employs any of its students shall not do so in a manner which violates Subpart E.

DISCUSSION

Section 86.38 requires every recipient that participates in an employment placement service to make certain that such participation does not assist any separate organization in discriminating on the basis of sex in employment. Thus institutions that sponsor career-placement activities must assure themselves that the institutions using their services do not discriminate in employment on the basis of sex. If a recipient discovers that any agency, organization, or person discriminates on the basis of sex in employment, the recipient is to stop rendering services to that agency, organization, or person.

The requirements of this section are in keeping with the one case that has dealt with this issue under Title VII of the Civil Rights Act of 1964. In *Kaplowitz v. University of Chicago,* 387 F. Supp. 42 (N.D. Ill. 1974), 12 women graduates of the University of Chicago Law School alleged that the school, through its placement service, maintained a policy of allowing employers that discriminated against women in employment to use the facilities of the law school to interview and otherwise to seek to hire law students and graduates of the school. It was contended that the law school, through this activity, had become an employment agency, and that this placement service was in violation of Title VII.

The district court agreed with the plaintiffs that the law school was an employment agency within the meaning of Title VII.

> While professional schools in general are primarily concerned with the training and education of their students, and while many schools might prefer not to have to dilute their resources on placement activities, career employment has become a major activity within the graduate school. The placement office at the Law School is the primary source through which employers hire University of Chicago law students and recent graduates; the vast majority of all positions obtained by students and recent graduates is through utilization of the placement office.
>
> The involvement of the Law School in operating its placement facilities is significant, and the importance of finding employment for its graduates is substantial, if for no other reason than to assure the quality of future applicants.

Kaplowitz v. University of Chicago, 387 F. Supp. at 46.

The court did not agree with the plaintiffs, however, that the law school had violated Title VII. The court noted that the regulations of the Equal Employment Opportunity Commission make an employment agency, which fills a job order that contains an unlawful sex preference, equally responsible with the employer under Title VII. In this instance, however, the court concluded that the University of Chicago had taken sufficient steps to assure itself that those employers using the school's placement service were not discriminating on the basis of sex.

The court noted that a brochure distributed by the placement office to employers included a statement on employment discrimination. That statement made it clear that the law school was "committed to the principle of equal opportunities for all individuals commensurate with their abilities and not limited by discrimination based on race, color, religion, national origin, or sex." Furthermore, the school let the prospective employers know that it assumed that this same commitment existed on the part of those firms using the placement service. In addition, the school had adopted a special procedure to deal with complaints made by students who were alleging discriminatory conduct by interviewers. Under this procedure, after an initial investigation to determine if the student complaint has some merit a letter is written to the alleged discriminator explaining the nature of the complaint, restating the law school's policy of nondiscrimination, requesting a response to the complaint (which would be made available to the complaining student), expressing the school's expectation that the firm would reaffirm its adherence to its nondiscrimination policy, and advising the firm that in the absence of an unqualified commitment to the concept of equal employment opportunity, the firm would not be invited to continue to use the school's interviewing or placement facilities.

In light of this procedure, the court concluded that the law school had done enough to comply with the mandate of Title VII to assure itsef that its facilities were not being used by private firms to discriminate in employment.

Section 86.38(b) makes it clear that if a recipient employs any of its students those students must be treated in accordance with the nondiscrimination mandates of the regulation relating to employment found in sections 86.51 through 86.61.

§ 86.39 Health And Insurance Benefits And Services

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

DISCUSSION

Section 86.39 requires recipients who provide medical, hospital, accident, or life insurance benefits to students to offer such plans to all students without regard to sex. In addition no recipient shall treat any student under these plans in a manner that would violate Subpart E (relating to employment) if the treatment were directed to employees. [Specifically, section 86.56, relating to fringe benefits, is relevant in determining the treatment to which students are entitled.]

The regulation, however, does permit a recipient to offer a benefit or service that may be used more frequently by students of one sex than of the other. In addition, if a recipient purports to provide "full coverage health service," such full coverage must include gynecological care.

The question of the constitutionality of excluding such gynecological services from a student health plan was the subject of litigation in *Bond v. Virginia Polytechnic Institute and State University,* 381 F. Supp. 1023 (W.D. Va. 1974). In *Bond,* female undergraduate and graduate students alleged that the failure to provide for pap tests and gynecological examinations under the student health plan worked an invidious discrimination in violation of the Fourteenth Amendment. No violation of Title IX was alleged. The court concluded that there was no violation of the Constitution in that the plan, which did not purport to be a "full coverage health service," did not cover any specialty services, including the prescription of contraceptive devices or drugs. *Bond v. Virginia Polytechnic Institute and State University,* 381 F. Supp. at 1024.

§ 86.40 Marital Or Parental Status

(a) Status generally. A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) Pregnancy and related conditions.

(1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physican that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to that status which she held when the leave began.

DISCUSSION

Section 86.40(a) prohibits a recipient from applying any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex. Unlike section 86.21, which applies only to admissions, this section applies to the treatment of students in all programs and activities offered by a recipient. Although under the regulation it would seem that a recipient could, without violating the regulation, adopt a rule that penalizes both male and female students because of marital or parental status, such a rule may violate the Constitution and thus be invalid.

In *Perry v. Granada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss. 1969), the school board had adopted a policy of forever excluding unwed mothers from admission to schools in the district. It was the board's belief that the presence of unwed mothers in the schools would be a disruptive influence on the other students and would give the appearance of approval on the part of the board to the illegitimate birth.

Although the court recognized the board's concerns, it also recognized that to forever penalize a student for having given birth to an illegitimate child was patently unreasonable:

> The continued exclusion of a girl without a hearing or some other opportunity to demonstrate her qualification for readmission serves no useful purpose and works an obvious hardship on the individual. It is arbitrary in that the individual is forever barred from seeking a high school education. Without a high school education, the individual is ill equipped for life, and is prevented from seeking higher education.

Perry v. Granada Municipal Separate School District, 300 F. Supp. at 753. The court then held that female unwed pregnant students could not be excluded from the schools of the district simply because they are unwed mothers. In addition, students who had been excluded were held to be entitled to readmission unless on a fair hearing before the school authorities they are found to be so lacking in moral character that their presence in the schools will taint the education of other students. In a later case the judge who wrote the opinion in *Perry* reaffirmed this holding, and further held that it was unconstitutional to equate unwed pregnancy with a lack of moral character such that other students in the school will be tainted. *See Shull v. Columbus Municipal Separate School*, 338 F. Supp. 1376 (N.D. Miss. 1972).

In a similar case, an unmarried but pregnant student was informed that, because of her condition, she could not attend the regular classes during the day. She could use the school's facilities after the regular classes were over, however, and could participate in the senior activities. The school made it clear that if she were married, she could continue to attend regular classes. The court concluded that the school's policy was unconstitutional in that there was no danger to the woman's physical or mental health if she attended classes during regular school hours, there was no likelihood that her presence would disrupt school activities, and there was no educational or other reason to justify segregating this student from the others and requiring her to receive educational treatment that is not the equal of that given to all others in her class. *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971).

The constitutional cases have not been restricted to the area of admissions. Several cases have dealt with the practice of excluding students from participation in extracurricular activities because of parental or marital status.

In *Davis v. Meek*, 344 F. Supp. 298 (N.D. Ohio 1972), the school board had adopted a policy providing that any boy who had contributed to the pregnancy of any girl out of wedlock was to be restricted to classes for the balance of the school year. In addition, the rule prohibited any married student from participating in extracurricular activities. In *Davis* a young man was found to have violated the rules and was, therefore, restricted to the school's regular classes. The board attempted to justify this rule as a means of discouraging marriage and thus keeping a low dropout rate. The court held, however, that despite all of the board's arguments "the fact remains that the plaintiff did legally get married, without in doing so violating any law of the state. He had thus attained a status where his marital privacy might not be invaded by the state, even for the laudable purpose of discouraging other children from doing what he did." *Davis v. Meek,* 344 F. Supp. at 300. In striking down the regulation as violative of the constitutional right of marital privacy, the court further noted that prior Supreme Court authority would preclude the school board from ever taking any action to restrict participation of married students. Similar conclusions were reached by the courts in *Romans v. Crenshaw,* 354 F. Supp. 868 (S.D. Texas 1972) (excluding a 16-year-old female, married and divorced, from all extracurricular activities is discriminatory on its face and is unconstitutional), and in *Hollon v. Mathis Independent School District,* 358 F. Supp. 1269 (S.D. Texas 1973) (rule prohibiting a married male student from participating on the high school football, basketball, and baseball teams held to be unconstitutional).

As a consequence, before a recipient adopts any rule relating to a student's marital or parental status, considerations other than those inherent in Title IX must be made.

Section 86.40(b) concerns itself with the treatment that may be accorded pregnant students. Under this subpart, the regulation takes the position that to classify students on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from pregnancy is to classify students on the basis of their sex. Thus, aside from the constitutional considerations discussed above, the regulation prohibits, on discrimination grounds, the automatic exclusion of any student from any educational program or activity, including extracurricular activities, on the basis of pregnancy or pregnancy-related conditions. Permitted by the regulation is the establishment of a separate portion of an education program or activity for pregnant students in which participation is voluntary on the part of the student. If a recipient chooses to offer such a program, it must ensure that the instructional program in this separate program is comparable to that offered to students who are not pregnant. Section 86.40 (b)(3). This standard of comparability extends not only to the course offerings and content, but also to the expense of participation for the student. In *Houston v. Prosser,* 361 F. Supp. 295 (N.D. Ga. 1973) all students who were parents were excluded from participating in regular day classes. Night classes were offered to those students who were willing to pay the tuition for the program, however, the court concluded that excluding students from the day classes and forcing them to pay tuition for the night classes (including the purchase of books and materials) violated the Equal Protection Clause of the Fourteenth Amendment.

Section 86.40 (b)(2) and (4) are premised on the fact that pregnancy per se is not a disability, but that at some time during each pregnancy, disability is inevitable. As a consequence, a recipient may require a pregnant student to obtain a certificate attesting to that student's ability to continue in the normal education program, but only if all students who have physical or emotional conditions requiring the attention of a physician are also subject to the same requirements. This requirement—that pregnancy be treated in the same manner as any other temporary disability—extends also to all medical or hospital benefits offered to students by recipients. Under these plans, pregnancy and pregnancy-related conditions must be treated in the same manner and under the same policies as any other temporary disability. An interpretation of the requirements of this subpart appears in a letter from Roy McKinney of the Office for Civil Rights, reported in the October 1976, *On Campus With Women,* the newsletter of the Project on the Status and Education of Women of the Association of American Colleges. McKinney said:

> For a covered institution to offer employees a health insurance policy that imposes a $50.00 deductible for pregnancy benefits but imposes no such deductible for other temporary disabilities would be a violation of the Title IX regulation . . . .
>
> Similarly, if a covered institution were to offer such a health insurance policy to its students, it would be in violation [of the Title IX regulation.]

(For a further discussion of the treatment of pregnancy as it relates to employment, see the discussion under section 86.57.)

Section 86.40 (b)(5) provides that all recipients must treat pregnancy as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician. After this leave, the student is to be reinstated to the same status that she held when the leave began. This leave policy is required of all recipients, including those who do not normally maintain leave policies for their students.

§ 86.41 Athletics

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by recipient, and no recipient shall provide any such athletics separately on such bases.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hocky, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(ii) The provision of equipment and supplies;
(iii) Scheduling of games and practice time;
(iv) Travel and per diem allowance;
(v) Opportunity to receive coaching and academic tutoring;
(vi) Assignment and compensation of coaches and tutors;
(vii) Provision of medical and training facilities and services;
(ix) Provision of housing and dining facilities and services;
(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) Adjustment period. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

DISCUSSION

The Department of Health, Education, and Welfare has taken the position that "athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirements of Title IX even in the absence of Federal funds going directly to athletics." 40 Fed. Reg. p. 24134 (June 4, 1975). This position is founded on case authority interpreting similar provisions found in Title VI, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 91 S. Ct. 1267 (1971); *United States v. Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F. 2d 385 (5th Cir. 1967), *cert. denied sub nom. United States v. Caddo Parish Board of Education*, 389 U.S. 840, 88 S. Ct. 67 (1967), and the direct mandate of Congress to include rules relating to athletics in the regulation implementing Title IX (Section 844 of the Education Amendments of 1974, Pub. L. 93–380, discussed *supra*, TITLE IX: THE STATUTE, The Amendment Process, p. 24). Section 86.41 was adopted to meet this congressional mandate. In general, the regulation provides various options to recipients for achievement of equity in their athletic programs. As in other areas of the regulation, however, there are constitutional considerations that cannot be ignored when dealing with the problem of sex equity in athletics. Because the regulation cannot sanction an otherwise unconstitutional act, the inter-relationship of the mandates of the Constitution and Title IX become highly significant.

Section 86.41(a), in a paraphrase of Title IX, provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise discriminated against in any athletic program offered by a recipient, whether club, intramural, or interscholastic. In addition, recipients are prohibited from offering any athletic program on a sex-segregated basis. This absolutist approach is fully consistent with the cases that have discussed the problem of sex-segregation in a constitutional context. Numerous cases have developed in which individual women desiring to compete in a particular sport sought access to formerly all male teams. In almost every instance, the courts concluded that to deny a woman the opportunity to compete in a sport solely because of her sex is unconstitutional, regardless of whether the sport is contact or noncontact.

The first cases brought dealt with noncontract sports only. In *Reed v. Nebraska School Activities Association*, 341 F. Supp. 258 (Neb. 1972), a school that did not have a girls' golf team refused to let a girl play on the boys' team. (The school had relied on the rules of the Nebraska atheltic association that prohibited co-ed teams in any sport). The court, in enjoining the school from enforcing the rule, concluded that if the state chose to afford boys' interscholastic competition and instruction at some expense and effort to the participants, (presumably because it was of some benefit to them), then the program would have a similar value to the girls and must also be made available to them.

Subsequently, in *Brenden v. Independent School District*, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973) two girl students sued to gain access to the district's tennis team, cross-country track team, and cross-county skiing team. One of the girls was an outstanding high school tennis player; the other excelled in cross-country track and cross-country skiing. Teams in each of these sports were restricted to boys, and no similar sports were offered for girls. (One of the girls was told that if she could find a sufficient number of girls interested in competing to justify the development of a team, then there would be a cross-country program for girls.) The trial court concluded that the league rules, which prohibited the participation by girls in boys' interscholastic athletic events, were unconstitutional. In an attempt to justify the rules, the district argued that the objective of the rules was to achieve equitable competition among classes and that, because of physiological differences, sex was a reasonable basis of classification to achieve this objective. The court recognized that although on the average there are substantial physiological differences between the sexes, "these physiological differences, insofar as they render the great majority of females unable to compete as effectively as males, have little relevance to [these plaintiffs]. Because of their level of achievement in competitive sports, [these plaintiffs] have overcome these physiological disabilities." *Brenden v. Independent School District,* 342 F. Supp. at 1233.

The school district next argued that to permit the female students to compete with the male students would hamper the development of the girls' athletic program. This argument was also rejected. In ruling that the rules were unconstitutional, the court recognized that it was

> confronted with a situation where two high school girls wish to take part in certain interscholastic boys' athletics; where it is shown that the girls could compete effectively on these teams; and where there are no alternative competitive programs sponsored by their schools which would provide an equal opportunity for competition for these girls; and where the rule, in its application, becomes unreasonable in light of the objectives which the rule seeks to promote.

Brenden v. Independent School District, 342 F. Supp. at p. 1234.

On appeal, the court made it clear that it was not faced with a case involving the question of separate but equal or with a case involving contact sports. The case, as presented, was one in which women were barred from any participation in sports of their interest. In affirming the conclusion that the district had violated the Constitution, the court noted that "discrimination on the basis of sex can no longer be justified by reliance on 'out-dated images . . . of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity.' " *Brenden v. Independent School District,* 477 F.2d at 1296. The court further found that the district had not shown that women were incapable of competing with men in noncontact sports. Even if they had shown that females as a class could not compete, the court concluded that this finding would not justify precluding qualified women from competing. "The failure to provide the plaintiffs with an individualized determination of their own ability to qualify for positions on these teams is . . . violative of the Equal Protection Clause. With respect to these two females, the record is clear. Their schools have failed to provide them with opportunities for interscholastic competition equal to those provided for males with similar athletic qualifications." *Brenden v. Independent School District,* 477 F.2d at 1302.

Similar results were reached by the courts in *Morris v. Michigan State Board of Education,* 472 F.2d 1207 (6th Cir. 1973) (Michigan High School Athletic Association enjoined from preventing or obstructing in any way individual girls from participating fully in varsity, noncontact interscholastic athletics and athletic contests because of their sex), and in *Gilpin v. Kansas State High School Activities Association,* 377 F. Supp. 1233 (Kan. 1973) (the automatic exclusion of women from men's teams where no separate program existed for women held to be unconstitutional in that such a rule ignores individual qualifications of particular athletes and commands dissimilar treatment for men and women on the basis of sex). *But see Bucha v. Illinois High School Association,* 351 F. Supp. 69 (N.D. Ill. 1972) (finding no violation of the Constitution where the former no-coed rule had been abolished and where, at the time, neither Illinois nor the United States had enacted legislation prohibiting sex discrimination in high school athletics).

The *Brenden* approach has been taken with respect to those sports that are considered contact.[4] In *Clinton v. Nagy,* 411 F. Supp. 1396 (N.D. Ohio 1974), a 12-year-old girl sought to play in the Cleveland Browns's Muny Football Association. Despite the fact that neither her mother nor her coach had any objections to her participation, she was prohibited from playing by the city solely because she was a girl. In granting a preliminary injunction to the plaintiff (thus permitting her to play), the court deemed it necessary to discuss the value of sport:

> [O]rganized contact sports such as football continue to be played, and those individuals who encourage young men to participate in these sports seem to do so with a sincere belief that although the game is potentially dangerous, the rewards which will be reaped from participation in the game offset the potential dangers. Organized contact sports have generally been thought of as an opportunity and means for a young boy to develop strength of character, leadership qualities and to provide competitive situations through which he will better learn to cope with the demands of the future. Yet, although these are presumably qualitites to which we desire all of the young to aspire, the opportunity to qualify to engage in sports activities through which such qualities may be developed has been granted to one class of the young and summarily denied to the other.

Clinton v. Nagy, 411 F. Supp. at 1400.

Muscare v. O'Malley, No. 76–C–3729 (N.D. Ill. 1976), dealt with a similar problem in the Chicago park district football program. The Chicago park district totally excluded females from the tackle football program although it offered touch football for girls. The district's justifications for this sex-segregation were two-fold: cultural and physiological. The court refused to give cognizance to the argument that cultural restraints mandated the exclusion of females from the tackle football program. "We are living in a new era now when governmental programs must be devised in such a way to afford equal treatment to all citizens or other persons who come within the ambit of these programs . . . . If the boys can't live with it, they are going to have to understand that they are living in the dawn of a new age when there are a lot of things they are going to have to get used to, and it is not going to be as hard as they might think." *Muscare v. O'Malley,* No. 76–C–3729 (N.D. Ill. 1976).

---

[4] Several cases were brought challenging the National Little League's policy of excluding girls from participation. Thus, in *Fortin v. Darlington Little League, Inc.,* 514 F.2d 344 (1st Cir. 1975), the court of appeals held that the Little League must admit females on the same terms and conditions available to males. However, by P.L. 93–551, (Dec. 26, 1974), Congress amended the Little League's federal charter so as to open the League to boys and girls alike.

The court then considered the physiological justifications for the separate programs. Initially, the court found that there was no equivalent program for girls in the park district, concluding that touch football was not the equivalent of tackle football. Furthermore, to relegate females to touch football, said the court, carried with it a flavor of second-class treatment. In ruling that the Chicago park district rule was unconstitutional, the court held that the plaintiff could be excluded from the tackle football program "only if the evidence shows that in her particular case there is a substantially enhanced danger of injury to her." On examining the evidence, the court found that the plaintiff was no more likely to be hurt playing tackle football than any other participant in the program and, therefore, must be permitted to participate in the league.

Rules adopted by athletic associations that limit participation in a particular sport to students of a particular sex have received similar treatment by the courts. In *Hoover v. Meiklejohn*, 430 F. Supp 164 (D. Colo. 1977) the federal court was asked to rule on the constitutionality of a rule of the Colorado High School Activities Association that limited the participation on interscholastic soccer teams to "members of the male sex." Donna Hoover, a high school junior, had been removed from the soccer team by the principal of her high school because of the athletic association's rule, although she had engaged in the conditioning and skills drills at the team's practice sessions and had played in junior varsity games.

The defendants attempted to justify this rule by arguing that physiological differences between the sexes (which could subject female players to an inordinate risk of injuries) required soccer (a contact sport) to be single sex. The court, however, could find no strong empirical data to support the rule. To the contrary,

> while males as a class tend to have an advantage in strength and speed over females as a class, the range of differences among individuals in both sexes is greater than the average difference between the sexes. The association has not established any eligibility criteria for participation in interscholastic soccer, excepting for sex. Accordingly, any male of any size and weight has the opportunity to be on an interscholastic team and no female is allowed to play, regardless of her size, weight, condition, or skill.

Hoover v. Meiklejohn, 430 F. Supp. at 166.

Furthermore, the goal of protecting the "disadvantaged female" from injury was found not to be a sufficient justification for the rule to withstand constitutional scrutiny.

> [T]o the extent that governmental concern for the health and safety of anyone who knowingly and voluntarily exposes himself or herself to possible injury can ever be an acceptable area of intrusion on individual liberty, there is no rationality in limiting this partronizing protection to females who want to play soccer.
>
> Women and girls constitute a majority of people in this country. To be effective citizens, they must be permitted to full participation in the educational programs designed for that purpose. To deny females equal access to athletics supported by public funds is to permit manipulation of governmental power for a masculine advantage.
>
> Egalitarianism is the philosophical foundation of our political process and the principle which energizes the equal protection clause of the Fourteenth Amendment. The emergence of female interest in an active involvement in all aspects of our society requires abandonment of many historical stereotypes. Any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality . . . It is an inescapable conclusion that the complete denial of any opportunity to play interscholastic soccer is a violation of the plaintiff's right to equal protection of the law under the Fourteenth Amendment.

Hoover v. Meiklejohn, 430 F. Supp. at 169–170.

The court also felt that in light of the ramifications of the ruling, it was appropriate to make some general observations about the constitutional concerns in athletic programs that are supported by public funds.

> The applicability of so fundamental a constitutional principle as equal educational opportunity should not depend upon anything so mutable as customs, usages, protective equipment and rules of play. The courts do not have competence to determine what games are appropriate for the schools or which, if any, teams should be separated by sex. What the courts can and must do is to insure that those who do make those decisions act with an awareness of what the Constitution does and does not require of them. Accordingly, it must be made clear that there is no constitutional requirement for the schools to provide any athletic program, as it is clear that there is no constitutional requirement to provide any public education. What is required is that whatever opportunity is made available be open to all on equal terms.
>
> Because there is no obligation to provide any soccer program and because equal opportunity can be given to the plaintiff class either by mixed-sex or comparable separate-sex teams, the defendants have a choice of actions to be taken. They may decide to discontinue soccer as an interscholastic athletic activity; they may decide to field separate teams for males and females, with substantial equality in funding, coaching, officiating and opportunity to play; or they may decide to permit both sexes to compete on the same team. Any of these actions would satisfy the equal protection requirements of the Constitution. What the defendants may not do is to continue to make interscholastic soccer available only to male students.

Hoover v. Meiklejohn, 430 F. Supp. at 171–2.

It should be remembered that none of the cases discussing the constitutionality of rules that restrict the opportunities of women have dealt with the issue of separate but equal, as none of the cases involved separate programs that approximated equity.[5]

Section 86.41 (b) of the regulation adopts the separate but equal approach with respect to certain sports. This approach is presented as an option that is available to a recipient but which is not mandated by the regulation. If a recipient chooses, it may operate separate teams for members of each sex either where selection for such teams is based on competitive skill or where the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular noncontact sport for members of one sex but does not operate such a team for members of the other sex, and if athletic opportunities for members of the excluded sex have previously been limited, then members of the excluded sex must be permitted to try out for the team offered. This would seem to be consistent with a narrow reading of the constitutional cases which have mandated equal opportunity for participation where there has been only one team offered in a sport. *See Reed v. Nebraska School Activities Association*, 341 F. Supp. 258 (Neb. 1972); *Brenden v. Independent School District*, 477 F. 2d 1292 (8th Cir. 1973); *Morris v. Michigan State Board of Education*, 472 F. 2d 1207 (6th Cir. 1973); *Gilpin v. Kansas State High School Activities Association*, 377 F. Supp. 1233 (Kan. 1973); *Carnes v. Tennessee Secondary School Athletic Association*, 415 F. Supp. 569 (E. Tenn. 1976).

---

[5] An exception to this rule has occurred in states that have examined separate programs as they relate to state equal rights amendments. Supreme courts in these states have concluded that rules which prohibit girls from competing or practicing against or with boys in athletic activities, including contact sports, violate the equal rights amendments. *See Commonwealth of Pennsylvania v. Pennsylvania Interscholastic Athletic Association*, No. 1526 C.D. 1973 (Pa. Sup. Ct. March 19, 1975).

By excluding contact sports (as identified in the regulation), from the conditions of section 86.41(b), the regulation purports to permit recipients to sponsor contact sports for members of one sex, while denying members of the other sex any comparable opportunities to compete. If the trend in the constitutional area continues to develop as it has in cases like *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974), *Muscare v. O'Malley*, No. 76–C–3729 (N.D. Ill. 1976), and *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977), then the constitutional validity of this regulation will have to be reexamined.

This seeming conflict between the regulation and the Constitution was at the heart of the issue in *Yellow Springs Exempted Village School District v. Ohio High School Athletic Association*, 443 F. Supp. 753 (S.D. Ohio 1978). In 1974 two female students competed for and were awarded positions on their school's sole interscholastic basketball team. Because the rules and regulations of the Ohio High School Athletic Association prohibited girls and boys from competing together on basketball teams ("[i]n all contact sports . . . team members shall be boys only"), the school excluded the girls from the team. By so doing, the school complied with the association's rules, but potentially violated the girls' constitutional rights. To resolve this conflict, the school board sought guidance from the court.

The court recognized that although the rules of the association deprived school girls of liberty without the due process of law, they nevertheless could stand if it could be demonstrated that they served some sufficiently important governmental interest. The two governmental objectives posited by the association were that the rules prevented injury to children and that they would maximize female athletic opportunities. The court recognized, however, that to achieve these goals, the association had assumed without exception that "girls are uniformly physically inferior to boys," and "are less proficient athletes than boys." *Yellow Springs Exempted Village School District v. Ohio High School Athletic Association*, 443 F. Supp. at 758.

The court concluded that such permanent presumptions are disfavored, especially when such presumptions might be rebutted if individualized determinations were made. The court thus held the rule to be unconstitutional, holding that "school girls who so desire . . . must be given the opportunity to compete with boys in interscholastic contact sports if they are physically qualified." *Yellow Springs Exempted Village School District v Ohio High School Athletic Association*, 443 F. Supp. at 758.

The court further noted that the Title IX regulations were also unconstitutional insofar as they suggest that the creation of all-male contact sport teams is a satisfactory method of compliance. The Constitution requires that girls who are qualified must be given the opportunity to demonstrate those qualifications and to compete with boys in all sports.

Thus what is apparent is that there are many ways in which to comply with the Title IX regulation and what is required is a continual examination by schools of their athletic programs to make certain that their programs comport with both the Title IX regulation and the Constitution. Furthermore, schools must remember that reliance on rules of a voluntary association will not immunize a program from scrutiny by the courts. See section 86.6(c) *supra* p. 43, *et seq.*

Section 86.41(c) provides that all recipients that operate or sponsor interscholastic, intercollegiate, club, or intramural athletics must provide equal athletic opportunity for members of both sexes, whether the sports are offered on a coeducational or on a separate sex basis. In determining whether equal opportunities are available, the Director will examine many factors, including the 10 set forth in section 86.41(c)(i) through (x). Thus relevant to a determination of whether equal opportunities exist are:

1. whether the selection of sports and levels of competition accommodate the interests and abilities of both sexes;
2. the provision and availability of equipment and supplies;
3. the scheduling of games and practice time;
4. travel and per diem allowances;
5. the opportunity to receive coaching and academic tutoring;
6. the assignment and compensation of coaches and tutors;
7. the provision of locker rooms, practice, and competitive facilities;
8. the provision of medical and training facilities and services;
9. the provision of housing and dining facilities;
10. publicity.

Furthermore, although unequal aggregate expenditures for members of each sex or for male and female teams will not, standing alone, constitute noncompliance with the act, the Director can consider the failure to provide necessary funds for teams for one sex when assessing equality of opportunity.

Case authority in the area of athletics has not defined what equal opportunity is. Rather, the few cases that discuss the issue do so in terms of what equal opportunity is not. Thus in *Muscare v. O'Malley*, No. 76–C–3729 (N.D. Ill. 1976), the court held that touch football was not the equivalent of tackle football. In all of the cases dealing with noncontact sports, the courts concluded that offering a sport for males only, and not offering any similar sport for females, was not equal opportunity. However a recent case has examined closely the concept of equal opportunity in the context of separate-sex basketball teams.

In *Cape v. Tennessee Secondary School Athletic Association*, 424 F. Supp. 732 (E.D. Tenn 1976), *rev'd.*, 563 F. 2d 793 (6th Cir. 1977) a female high school student claimed that rules for girls' interscholastic basketball, which were different from those applied to boys' interscholastic basketball, deprived her of equal educational opportunity in violation of the Constitution. More specifically, the Tennessee Secondary School Athletic Association had adopted nine supplemental rules applicable only to girls' basketball. Under these rules, girls' teams are composed of six players, three forwards and three guards, however, boys' teams have five players. On girls' teams, only forwards may play in their team's front court, and only guards may play in their team's back court; on boy's teams, all players play on the full court, front and back. In girls' basketball, only forwards are permitted to score a goal for their team, including free throws awarded because of personal fouls. In boy's basketball, any team member may score a goal for the team.

The plaintiff contended that she was denied the full benefits of playing basketball because, as a guard, she was never able to set up plays and participate in the strategy of the game. She also claimed that she was denied the physical development that results from playing the full-court game. These limitations, she alleged, would make it virtually impossible for her to obtain an athletic scholarship in basketball because she would have played only as a guard and would lack training in the shooting skills of a forward.

The association attempted to justify the separate rules as furthering the following objectives:

1. to protect those student athletes who are weaker and incapable of playing the full court game from harming themselves;
2. to provide the opportunity for more student athletes to play in basketball games.
3. to provide the opportunity for awkward and clumsy student athletes to play defense only.
4. To provide a more interesting and "faster" game for the fans.
5. to ensure continued crowd support and attendance (game receipts) because the fans are accustomed to the split-court game.

Although recognizing that these objectives were not unconstitutional in and of themselves, the court looked further to determine whether the rules were rationally related to these stated objectives. (*See* THE CONCEPT OF DISCRIMINATION, The Theory, *supra* at 13).

The court concluded that the rules had no rational relationship to these objectives:

> **Objective 1:**
>
> The use of sex as a criterion for achieving this objective is both under-inclusive and over-inclusive. Because there are surely some boys who could benefit from the split-court, less strenuous game played by the girls, the classification fails to include all the weak and incapable athletes. Similarly, there are female athletes, including the plaintiff, who are willing and able to play the full-court game. Therefore, the classification includes those not in need of protection. Indeed, the proof established that most female basketball players are capable of playing full-court ball.

Cape. v. Tennessee Secondary School Athletic Association, 424 F. Supp. at 741.

> **Objective 2:**
>
> The split-court rules do allow a team to place six players, instead of the usual five, on the court at one time. But, as one witness pointed out, a full-court game often requires much substition and, depending on how a coach runs his or her team, the five-player, full-court game may result in more participation for a greater number of players than would the six player, split-court rules. Regardless of whether the split-court game does, in fact, allow more participation, the Court finds that classification on the basis of sex is not a rational means of accomplishing the objective of greater participation.

Cape v. Tennessee Secondary School Athletic Association, 424 F. Supp. at 741.

> **Objective 3:**
>
> Again, . . . we find that the sex-based classification is both over and under-inclusive in relation to the objective of allowing awkward and clumsy athletes to play. Undoubtedly, there are many awkward and clumsy male athletes who could benefit from playing under the split-court rules. Also, there are many graceful and agile female athletes who gain nothing from rules intended to benefit the awkward and clumsy.

Cape v. Tennessee Secondary School Athletic Association, 424 F. Supp. at 741.

> **Objectives 4 and 5:**
>
> The Court is of the opinion that the objectives of sustaining crowd interest and support (game receipts) are insufficient justifications to support a sex-based classification resulting in disparate educational opportunities. We note that administrative convenience, i.e., saving the government certain costs, has been rejected several times [by the Supreme Court] as a basis for sex discrimination . . . . It is unlikely, therefore, that a *predicted* drop in crowd support and revenue would suffice to support a sex-based classification when a *guaranteed* savings of governmental expenditures failed to do the same.
>
> Furthermore, the proof has raised serious doubt concerning the defendants' claims that the girls' game is more interesting, and that a change to full-court rules would diminish crowd support. For example, Coach Aberdeen stated that, in his opinion, girls' basketball is popular in Tennessee, not because of the split-court rules, but because of good coaches, good athletes, citizens in the State who support their young female athletes, and the considerable tradition of high quality, competitive, interscholastic girls' basketball in this State. (Emphasis original)

Cape v. Tennessee Secondary School Athletic Association, 424 F. Supp. at 741.

The court finally concluded that the rules and their objectives were based

> on an underlying assumption that female student athletes are weaker, less capable, and more awkward than their male counterparts. The Supreme court has held that such "archaic and overbroad" sex-based generalizations "could not be tolerated under the Constitution." *Weinberger v. Wiesenfeld, supra*, 420 U.S. at 643, 95 S. Ct. at 1231.

Furthermore, the court concluded that the injury to plaintiff was not *de minimis*, but was substantial:

> [T]he Court recognizes that athletics "has come to be generally recognized as a fundamental ingredient of the educational process. . . . " Athletics is no longer strictly an "extracurricular" activity, but has become an integral ingredient in a well rounded curriculum. Thus, any injury suffered by the plaintiff can be spoken of in terms of a deprivation of an equal educational opportunity solely by reason of her sex.

Cape v. Tennessee Secondary School Athletic Association, 424 F. Supp. at 743.

To substantiate this conclusion, the court relied on the proof presented at trial, which demonstrated that the plaintiff was deprived of the greater health benefits enjoyed by male players under the full-court rules, and that she had a lesser opportunity to gain a college scholarship than she would if she could play under the full-court rules.

On appeal, the court noted that the plaintiff had not challenged the creation of entirely separate basketball leagues for males and females. From this fact the court assumed therefore that for the purposes of this case, this classification by gender was valid. Having made this assumption, the court went on to hold that "[w]hen the classification . . . relates to athletic activity, it must be apparent that its basis is the distinct differences in physical characteristics and capabilities between the sexes and that the differences are reflected in the sport of basketball by how the game itself is played. It takes little imagination to realize that were play and competition not separated by sex, the great bulk of females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tennessee Secondary School Athletic Association*, 563 F. 2d at 795. Thus having concluded that girls are less capable athletes than boys, the court reversed the district court decision and recommended that plaintiff seek relief within the framework of the association. *See also Jones v. Oklahoma Secondary School Activities Association*, 453 F. Supp. 150 (W. Okla. 1977) where the court reached a similar result after having identified the plaintiff's challenge as insubstantial.

Section 86.41(d) contains an adjustment period similar to that found in Section 86.34. Recipients that operate or sponsor covered athletic programs at the elementary school level must have complied as expeditiously as possible, but in no event later than July 21, 1976. Recipients that offer covered athletic programs at the secondary or post-secondary level must also have complied as expeditiously as possible, but in no event later than July 21, 1978.

§ 86.42 Textbooks and Curricular Material

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

DISCUSSION

This section of the regulation exempts from Title IX's coverage textbooks and curricular materials. The Department of Health, Education, and Welfare has taken the position that although sex stereotyping in textbooks and curricular materials is a serious matter, the imposition of restrictions in this area would "inevitably limit communication and would thrust the department in to the role of federal censor. Accordingly, the department has construed Title IX as not reaching textbooks and curricular materials on the ground that to follow another interpretation might place the department in a position of limiting free expression in violation of the First amendment." 40 Fed. Reg. p. 24135 (June 4, 1975).

However, the regulation does not prohibit recipients from voluntarily adopting screening procedures, consistent with the First Amendment, to be used in the selection of curricular materials.

Subpart E – Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

Subpart E contains the provisions covering employment in education programs and activities. In general, the subpart consists of a commingling of the Guidelines on Discrimination Because of Sex (29 C.F.R. Part 1604) of the Equal Employment Opportunity Commission (EEOC), and the regulations of the Office of Federal Contract Compliance (OFCC), United States Department of Labor (41 C.F.R. Part 60). The subpart covers all aspects of employment, from recruiting through job assignment, compensation, and fringe benefits.

This subpart has been one of the more controversial portions of the regulations. Central to this controversy has been the debate as to whether or not the regulation can, consistent with Title IX, extend to the employment practices of recipients. The two sides of this debate can best be illustrated by examining the decision in *Romeo Community Schools v. United States Department of Health, Education and Welfare*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, —— F.2d ——, 19 FEP Cases 1720 (6th Cir. 1979).

In *Romeo*, a recipient of federal financial assistance (in the form of funds earmarked for remedial reading programs, the purchase of library books, the provision of vocational education, and the provision of free milk to disadvantaged students) challenged the authority of HEW to promulgate those portions of the regulation that purport to cover employment. Specifically, the Romeo School District challenged the provision of the regulation relating to pregnancy and maternity leave (section 86.57).

HEW argued to the court that the employment provisions were consistent with Title IX and within the department's authority. HEW based its position on a comparison of Title IX to Title VI. Although Title IX was initially intended as an amendment to Title VI (and parallels the language of Title VI), there is one important difference between the two statutes. Title VI contains a provision specifically excluding discrimination in employment from the act's general coverage. Title 42 U.S.C. Section 2000d(3) provides that nothing contained in the nondiscrimination mandate of Title VI "shall be construed to authorize action under this subchapter by any department or agency, or labor organization, except where a primary objective of the federal financial assistance is to provide employment." Title IX contains no such provision. Thus, because no such limitation appears in Title IX, HEW argued that Congress did not intend to limit the scope of Title IX to exclude coverage of sex discrimination in employment.

HEW also contended that the legislative history of Title IX demonstrated a congressional intent to regulate employment practices. The department cited the remarks of Senator Birch Bayh relating to the coverage of faculty employment, and to the fact that Congress reviewed the Title IX regulation's employment provisions in July 1975, and declined to disapprove them as inconsistent with the act. During the hearings on the regulations, employment practices under Title IX were specifically discussed. Thus, HEW concluded that employment practices of recipients were intended to be covered by the act.

The Romeo schools analyzed the problem in a different manner. Romeo attributed the discrepancy between Title VI and Title IX to the fact that Title IX was enacted as part of a larger legislative program, which included amendments to Title VII of the Civil Rights Act of 1964, to bring educational institutions within that act's mandate of nondiscrimination. (In addition, the Equal Pay Act was amended to extend coverage to certain theretofore exempt employees.) Thus, to avoid contradiction within the statute (between amendments to Title VII covering employment and a portion of Title IX exempting employment), Congress removed the provision from Title IX.

Furthermore, Romeo contended that the legislative history of Title IX supported its position. Relying on the debate surrounding Title VI, it was argued that Congress never considered Title VI, even without the limiting language of Section 2000d(3), to cover race discrimination in employment. Rather, the exclusionary language was included as an afterthought to make this point clear and to resolve whatever ambiguity may have arisen.

Romeo also pointed out that all of those who had testified in support of Title IX's employment provisions did so in relation to the amendments to Title VII and the Equal Pay Act and not in reference to the nondiscrimination provision of Title IX.

The district court, noting these two positions, chose to analyze the language of Title IX rather than to examine the legislative history of the Act. The court noted that although section 1681 was cast in broad terms, it nevertheless

> addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs. Section 1681 must therefore be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established, and this can only mean the school children in those programs. As a reference to the faculty employees, the language of § 1681 is indirect, if not obscure. Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries; teachers are 'subjected to discrimination *under*' these programs, (emphasis added), only to the extent that the programs themselves may be established and operated in an employment-related discriminatory way. . . . When Congress means to statutorily regulate employment discrimination, it uniformly does so in more explicit terms than this.

Romeo Community Schools v. United States Department of Health, Education, and Welfare, 438 F. Supp. at 1031–32.

The court finally concluded that Title IX was written in broad terms, not to cover all forms of sex discrimination in education, but to cover the variety of education programs funded by the federal government and the many ways in which sex discrimination against students in those programs can be manifested. Support for this conclusion was found in the fact that all exclusions provided for in section 1681 relate only to student activity or enrollment, suggesting either that Congress meant to allow wide open coverage of employment practices under section 1681, while closely regulating the act's coverage in all other respects, or that Congress never meant to include employment practices within the coverage of the act in the first place. The court found the second alternative the more likely.

Furthermore, the court concluded that the "program-specific" language of section 1682, which limits HEW's enforcement power, necessarily was a limitation on the scope of section 1681:

> [I]n a situation where a federally assisted school system discriminates against its teacher employees, the Section 1682 sanction has very limited justification. Termination of federal aid will have no more enforcement value in such a case, and the students participating in affected programs will still be the ones to suffer from the aid termination sanction, even though the sanction will not be imposed for the purpose of enforcing their rights. The court doubts that Congress would resort to such an arbitrary enforcement measure where alternative methods or prohibiting employment discrimination, more effective and less costly than this, are readily available.

Romeo Community Schools v. United States Department of Health, Education, and Welfare, 438 F. Supp. at 1032–33.

The court was of the opinion that because an educational institution's employment policies are general in nature, covering all faculty employees in all education programs, whether federally funded or not, the HEW regulation would entail the regulation of employment practices unrelated to the particular programs funded by the federal government and without regard to whether the practices result in sex discrimination against the beneficiaries of the programs. This would result in institution wide reform, contrary to the program-specific language of section 1682.

Even more persuasive in the court's opinion was that Congress specifically provided for the regulation of employment discrimination (under both Title VII and the Equal Pay Act) elsewhere in Title IX as initially proposed. Concluding that because the governmental agencies created to enforce these acts have the expertise and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment (which HEW lacked under Title IX), the court found it difficult to believe that Congress perceived any need under Title IX to delegate to HEW authority similar to that already delegated to other agencies.

Thus the court concluded that section 1681 must be interpreted as a prohibition of sex discrimination by federally funded educational institutions against their students only, even if it can be shown that the discrimination against the employees results in discrimination against the students. Although the court's opinion declared all of subpart E to be invalid, the court's judgment, entered to implement its opinion, took a narrower approach, striking down only that section of the regulation relating to pregnancy—section 86.57.

On appeal, the United States Court of Appeals for the Sixth Circuit agreed with the district court, concluding that its analysis was a reasonable construction of Title IX as part of the mosaic of federal statutes that protect the rights of women and minorities. *Romeo Community Schools v. HEW*, ——F.2d——, 19 FEP cases 1720, 1722 (6th Cir. 1979). *See also Isleboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979), affirming *Brunswick School Board v. Califano*, 449 F. Supp. 866 (D. Maine 1978); *Junior College District of St. Louis v. Califano*, ——F.2d——, 19 FEP Cases 801 (8th Cir. 1979), affirming 455 F.Supp. 1212 (E.D. Mo. 1978); *University of Toledo v. HEW*, 464 F.Supp. 693 (N.D. Ohio 1979); *McCarthy v. Burkholder*, 448 F.Supp. 41 (D. Kansas 1978).

This decision leaves many questions unanswered. First, the result is contrary to the conclusion reached by the court in *Piascik v. Cleveland Museum of Art*, 426 F.Supp. 779 (N.D. Ohio 1976). In *Piascik*, a female applicant for the position of museum security guard alleged that she had been denied employment because of her sex in violation of Title IX. In discussing whether Title IX was available to the plaintiff as a cause of action, the court considered the scope of the act. The court noted that section 1681 was enacted in the same bill that removed the specific exclusion of educational institutions from Title VII, and recognized that to permit Title IX charges of sex discrimination would duplicate the express private remedy for such employment discrimination contained in Title VII. Nevertheless, the court concluded that Title IX did reach the employment practices of recipient institutions. *Piascik v. Cleveland Museum of Art*, 426 F.Supp. at 780–781, n. 1.

Romeo is also contrary to the results reached under Title VI. In instances where federal funds are received expressly for the purpose of employment, Title VI gives the federal agency administering those funds the authority to impose employment related regulations on the recipient of those federal funds, *Cf. Afro American Patrolmen's League v. Duck*, 503 F.2d 294 (6th Cir. 1974); *NAACP, Western Region v. Brennan*, 360 F. Supp. 1006 (D.D.C. 1973), despite the fact that recipient may have to adopt two separate sets of employment policies—one set for employees paid out of federal funds, and one set for employees paid for by the recipient out of its own funds. (Similar dual standards could develop as a result of Executive Order 11246, which bans discrimination on the basis of race, color, religion, sex, or national origin in employment on all government contracts performed by private individuals or contractors. *See Contractors Association of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854, 92 S. Ct. 98 (1971)).

Furthermore, in *U.S. v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *decree corrected* 380 F.2d 385, *cert. denied*, 839 U.S. 840, 88 S.Ct. 77 (1967), the court was faced with the question of whether, within the confines of Title VI, race discrimination against faculty employees was covered by the act. Citing to the legislative history surrounding Title VI, the court noted that Title VI was intended to reach at least those employees who were the beneficiaries of federal assistance programs. However, the court refused to accept the defendant's argument that Title VI could not permit interference with the employment practices of schools. "Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers." *U.S. v. Jefferson County Board of Education* 372 F.2d at 883.

In addition, although the *Romeo* courts recognized that those who testified in support of Title IX's employment provisions did not make reference to any substantive provision of the Act, the court concluded from this that testimony was intended to relate soley to the proposed amendments to Title VII. However, the testimony at that time not only made reference to Title VII, but it also urged Congress to remedy the shortcomings of Executive Order 11246. *Under that order, the federal government* has banned discrimination on the basis of race, color, religion, sex, and national origin in employment on all government contracts, including but not limited to construction contracts. HEW has been delegated the enforcement authority for this order in regard to educational institutions. Because Title IX is written in terms of federal financial assistance, it is equally consistent to conclude that the act was intended to strengthen the enforcement powers that the federal government had over programs funded by federal monies.

This conclusion becomes more persuasive when it is understood that the coverage of Title VII is not coextensive with the coverage of Title IX. Title IX applies to recipients of federal financial assistance. Title VII, however, has no relationship to federal financial assistance. Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin by employers of 15 or more employees. Employers who employ less than 15 employees are not covered. As a consequence, the suggestion that there are more effective and less costly methods for prohibiting discrimination than Title IX fails to recognize that as to those employers who receive federal financial assistance but who employ less than 15 employees there is no prohibition of discrimination, a result that Congress surely could not have anticipated.

Thus the *Romeo* case leaves many issues unresolved, and, as in all other areas of litigation, the final solution of these issues may take years. In the meantime, these contradictions, of necessity, will continue to exist until further clarifying legislation or litigation develops.

Numerous *other* enactments continue to govern the employment practices of most educational institutions: the Constitution of the United States, Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, Executive Order 11246, Title VII and Title VIII of the Public Health Service Act, and numerous local antidiscrimination statutes and ordinances. *See* the discussion accompanying section 86.6 of the regulations, *supra*. These many enactments, all of which affect employer/employee relations, have resulted in a substantial body of case authority defining the parameters of legal actions relating to employment. This authority cannot be adequately synthesized in a work such as this. One can only hope to present illustrative examples where they will be useful. So, here, as is the case in all areas, when a problem of legal interpretation arises, it is always best for recipients to seek advice from competent counsel whenever evaluating specific policies and practices.

§ 86.51 Employment

(a) General.

(1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideraton, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a non-discriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) Application. The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient.

(8) Selection and financial support for training, including apprenticeship, professional meeting, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

DISCUSSION

Section 86.51, through both the general and specific subparts, sets forth the nondiscrimination mandate as it relates to the employment practices of a recipient. As has been pointed out, *Romeo Community Schools v. United States Department of Health, Education and Welfare*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, —— F.2d ——, 19 FEP Cases 1720 (6th Cir. 1979) declared that this section and all succeeding sections relating to employment were invalid and of no legal force and effect. However, because another case has suggested a contrary result, *Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio 1976), the status of the employment portions of the regulation is not yet resolved.

Subpart (a)(1) restates the concept of section 1681 in the employment sphere, applying the general language of the act to employment or recruitment, consideration, or selection therefore. Subpart (a)(2) expands on (a)(1), requiring recipients to make all employment decisions in a nondiscriminatory manner. Prohibited by this section are practices that limit, segregate, or classify applicants or employees in a way that could adversely affect their employment opportunities because of sex. Banned by this provision are not only policies that restrict individuals of a particular sex to certain jobs, departments, or functions, but also those seemingly neutral policies that restrict individuals on the basis of characteristics that are the functional equivalent of "sex."

Thus, an employer cannot refuse to hire an employee on the basis of stereotyped characterizations of his or her sex (e.g., women make better flight attendants than men, *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275 (1971)), nor assign an employee to a particular job or department on the basis of preconceived opinions as to the capacities of individuals of his or her sex. (*Pond v. Braniff Airways. Inc.* 500 F.2d 161 (5th Cir. 1974)).

In addition, practices that appear neutral may result in discrimination. When an employer's total work force comprises only individuals of one sex, word-of-mouth recruiting may perpetuate past discrimination and result in discrimination on the basis of sex. *Nance v. Union Carbide Corp., Consumer Products Division*, 397 F. Supp. 436 (D.N.C. 1975).

Subpart (a)(3) prohibits a recipient from entering into any contractual relationship that has the effect of subjecting employees or students to discrimination. This includes contracts with employment agencies for referral purposes, union contracts, or contracts with any entity that provides or administers fringe benefits to the employees of the recipient (i.e., insurance companies).

Subpart (a)(4) carries into the employment sector the limitation discussed in section 86.22, *supra* in the admissions sector. Thus a recipient shall not give preference to applicants for employment because such applicants attended any institution or entity that limits its enrollment totally or predominantly to members of one sex, if the result of this practice has the effect of discriminating on the basis of sex. In other words, it is not sufficient for a recipient to abandon facially discriminatory policies if, as their replacement, the recipient adopts the discriminatory policies of a third party.

Of concern is the effect of veteran's preference in this area. Many public employers grant preferences for appointment to veterans. Yet because of the history of discrimination against women in the military (as well as a congressionally imposed quota on the number of women annually to be admitted to the armed forces), such a practice has the effect of preferring men over women for employment, and could violate the regulation. Just such a question has developed in the public employment sphere, independent of Title IX.

In *Feeney v. Commonwealth of Massachusetts*, 17 FEP Cases 659 (D. Mass. 1978), a three-judge court declared that the Massachusetts veterans' preference statute granting preference in public employment violated the Equal Protection Clause of the Fourteenth Amendment. Although the court concluded that the statute was not facially discriminatory, it did find that it was not impartial or neutral because of its impact on the opportunities of women. Persuasive to the court was that the statute effectively tied women's employment opportunities to the discriminatory admission standards of the Armed Forces, and that service in the military bore no demonstrable relationship for civilian public service.

The Supreme Court disagreed. The Court reiterated its earlier holdings that when a neutral law has a disparate impact on a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. A mere showing of disparate impact, however, no matter how severe, does not end the inquiry, but is rather the starting point for the application of a two-fold test. "The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination." *Personnel Administrator of Massachusetts v. Feeney*, —— U.S. ——, 99 S.Ct. at 2293.

Applying this test to the facts before it, the Court concluded that the Massachusetts scheme was not unconstitutional. "[N]othing in the record demonstrates that the preference for veterans was originally devised or subsequently reenacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service. *Personnel Administrator of Massachusetts v. Feeney*, —— U.S. ——, 99 S.Ct. at 2296.

Subpart (b) sets forth the aspects of employment to which the general employment regulations apply. Included are all aspects of recruitment, hiring, promotion, retention, rates of pay and compensation, job assignment, terms of collective bargaining agreements, leaves of absence (including leave resulting from pregnancy and pregnancy-related conditions), fringe benefits, training and apprenticeship programs, employer-sponsored activities (whether social or recreational), and any other term, condition, or privilege of employment. Although some of these areas are the subject of further provisions of the regulation (recruitment, section 86.53; rates of pay, section 86.54; job classifications, section 86.55; pregnancy, section 86.57; fringe benefits, section 86.56), others are mentioned only here and deserve discussion.

Subpart (b)(2) brings within the act's coverage the application of nepotism policies. Although nepotism policies, in and of themselves, do not violate Title IX, *Cf. Harper v. Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975), where a nepotism rule, which prohibits the parent, child, brother, sister, husband, or wife of any member of the academic or nonacademic staff of a college from appointment to that college, is applied unevenly and results in discrimination against women, it is prohibited. *Sanbonmatsu v. Boyer*, 8 EPD ¶ 9704 (N.Y.A.D. 1974).

Furthermore, recipients may not adopt one policy concerning the hiring and retention of male employees and maintain a separate and different policy for the employment of females. *McArthur v. Southern Airways, Inc.*, 404 F. Supp. 508 (D. Ga. 1975). Standards for hiring and promotion, once adopted, must be applied uniformly to all employees.

Similarly, the courts have been unsympathetic to the contention of employers that customer or co-worker preference requires the hiring of a person of a particular sex. The most famous case in this area is *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275 (1971). In *Diaz*, a male had been denied a job as a flight attendant because the airline, Pan Am, hired only females for the job. Pan Am, through the presentation of the testimony of a psychiatrist, attempted to prove that because of the unique environment created in an airplane cabin, the special psychological needs of the passengers could be met only by female flight attendants. In addition, the airline argued that its passengers preferred female attendants.

The court rejected both arguments. First, the court found the primary function of an airline to be to transport passengers safely from one point to another, and although a pleasant environment may be important, it is tangential to the essence of that function. As to the passengers' preference, the court said:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to preform the primary function or service it offers.

Diaz v. Pan American World Airways, Inc., 442 F.2d at 389.

Subpart (b)(10) brings within this section's coverage all other terms, conditions, or privileges of employment. Language similar to this, appearing in Title VII, has received some interpretation. In *Harrington v. Vandalia-Butler Board of Educaton*, 418 F. Supp. 603 (S.D. Ohio 1976), *rev'd on other grounds*, 585 F.2d 192 (6th cir. 1978), *cert. denied*, ___ U.S. ___ 99 S.Ct. 1269 (1979) the plaintiff, a female physical education teacher, alleged that because she was always assigned to teach physical education in the girls' facility (which was substantially inferior to the boys' facility), she was being denied her Title VII right to equal conditions of employment. In ruling in her favor, the court found that the girls' gymnasium lacked the natural light and ventilation of the boys' gymnasium; that it was substantially smaller than the boys' facility; that because of the nature of the facility, the female teacher could not supervise her entire class properly; that she was handicapped in the performance of her job by being provided with inadequate equipment; and that she was not provided with private shower or toilet facilities comparable to those provided for the male teachers. In awarding the plaintiff $6,000 for her injuries, the court concluded that it is a violation of Title VII to assign female teachers, who perform the same services as male teachers, to facilities that are inferior to those available to the males and, therefore, handicap the teacher's ability to supervise and teach.

§ 86.52 Employment Criteria

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other cirterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose which do not have such disproportionately adverse effect, are shown to be unavailable.

DISCUSSION

Section 86.52 expands upon section 86.51 to provide that a recipient shall not use any test or criterion for employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless the test is shown to predict validly successful performance in the job and no alternative test is available that does not have such an adverse effect. This is not to say that a recipient may never test applicants for employment. The regulation merely prohibits the use of a device that is discriminatory and not necessarily job related. That a recipient did not intend to discriminate in the administration of the test is no defense. This section is merely a restatement of the principle announced in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971). In *Griggs*, the Court was analyzing the requirement that all employees have a high school education as a condition of employment. Although neutral on its face, it was shown statistically that this practice had the effect of denying employment to substantially more blacks than to whites, thus perpetuating the company's earlier discriminatory hiring practices. Furthermore, it was demonstrated that a high school education was not necessary for the successful performance of the job. The Court concluded that in light of the discriminatory impact of the test, the practice must be discontinued unless the company could show that a high school education is necessary for the successful performance of a specific job and the operation of the business.

Since the announcement of *Griggs*, its principle has been applied broadly throughout the employment process. *Tests* has been interpreted to mean not only the traditional paper-and-pencil type, but also any device used to select employees for hire or promotion. In addition, *validation* has become a term of art. It is through the process of validation tht employers determine whether or not a specific test or criterion has a significant relationship to actual performance on the job. There are essentially three types of validation, criterion-related validation, construct validation, and content validation. A test has criterion validity if test scores match job performance ratings, construct validity if it tests for traits necessary for performance of the job, and content validity if the test closely duplicates the duties of the job. The most accurate kind of validity is criterion validity. This kind of validity is not always feasible, however. In these situations, construct and content validity may be used by employers. *See generally Albemarle v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975).

Even when a test is shown to be a valid predictor of success, its use may still be prohibited. The regulation further requires that it be demonstrated that no alternative valid predictor be available that does not produce a discriminatory result. Only if such an alternative does not exist will the use of an otherwise discriminatory device be permitted. Of course, if a discriminatory test does not validly predict successful performance, then it cannot be employed.

This concept as it relates to sex bias was recently the subject of discussion by the Supreme Court in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720 (1977). In *Dothard*, the Court was asked to review a district court decision that held that Alabama's minimum height and weight requirements for eligibility for employment by the Alabama Board of Corrections were sexually discriminatory and violated Title VII. In its opinion, the Supreme Court noted that the impact of the requirements was clearly discriminatory, excluding 41.13% of the female population from consideration, but excluding less than 1% of the male population. Furthermore, the Court found that the height and weight requirements were not job related on the basis of their alleged relationship to strength. No evidence was presented that established a correlation between the height and weight requirments and the requisite amount of strength thought necessary to perform the job. Furthermore, even assuming that strength is essential to successful job performance, the state could have achieved its purpose by adopting and validating a test for applicants that measures strength directly. The state's failure properly to validate this selection device resulted in it being held to be invalid under Title VII.

§ 86.53 Recruitment

(a) Nondiscriminatory recruitment and hiring. A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) Recruitment patterns. A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discrimination on the basis of sex in violation of this subpart.

DISCUSSION

Section 86.53 covers the recruitment and hiring practices of recipients. Prohibited is discrimination on the basis of sex in recruitment and hiring. In addition, when a recipient has been found to be presently discriminating or to have in the past discriminated, the recipient is mandated to affirmatively recruit members of the sex so discriminated against so as to overcome the effects of such past or present descrimination. Relevant to this requirement is the language of the court in *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973). In *Johnson*, a female assistant professor in the School of Medicine challenged the university's decision to terminate her. In support of its decision to grant an injunction, the court found intentional wrongdoing on the part of the university,

> from the failure to implement or set any data for an affirmative action plan to eliminate such discrimination and the fact that while affirmative action was supposed to have been taken, the number of women faculty members in this school substantially decreased instead of increased.

Johnson v. University of Pittsburgh, 359 F. Supp. at 1010.

Thus, any affirmative action plan instituted by a recipient should be monitored to make certain that it is working and not merely a paper promise.

Subpart (b) provides that a recipient shall not recruit primarily or exclusively at institutions that furnish applicants who are members of a particular sex if such recruitment has the effect of discriminating on the basis of sex. The regulation does not purport to ban recruitment through such institutions, but rather places the burden on the recipient to make certain that the decision to use the services of such entities does not circumvent the purposes of the act.

§ 86.54 Compensation

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

DISCUSSION

Section 86.54 prohibits sex discrimination in rates of pay or other compensation. Although intended to parallel the wording of the Equal Pay Act of 1963, the regulation also prohibits those practices which are discriminatory independent of the Equal Pay Act. Thus, a recipient cannot discriminate in compensation between men and women because a woman may be willing to work for less than a man, *Di Salvo v. Chamber of Commerce of Greater Kansas City*, 416 F. Supp. 844 (D. Mo. 1976), or by denying women the opportunity for overtime work assignments, *Garneau v. Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971).

Subpart (b) adopts the language of the Equal Pay Act of 1963 as the standard under Title IX. Thus, case law established under that act will be looked to for guidance when evaluating the compensation policies of recipients. In general, employees of one sex must be paid at the same rate as employees of the other sex when performing equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. This proscription applies to all kinds of compensation, including wages, bonuses, overtime, fringe benefits, sick pay, and noncash items.

In determining whether two jobs are "equal" for Equal Pay purposes, the inquiry turns to whether the jobs require equal skill (as measured by the actual skill needed to perform the job, not the skill possessed by certain employees in that job), equal effort (as measured by the physical or mental exertion needed for the perforamnce of the job), equal responsibility (as measured by the degree of accountability involved), and are performed under similar working conditions (measured by an analysis of the surroundings and the hazards encountered by the employees).

In meeting this test, it has been established that the two jobs need not be identical to be considered "equal." If the two jobs are substantially equal, insignificant differences will be deemed irrelevant. *Hodgson v. Corning Glass Works*, 417 U.S. 188, 94 S.Ct. 2223 (1974). Furthermore, the actual requirements and performance of the job, and not formal job descriptions or titles, are controlling. *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282 (4th Cir. 1974), *cert. denied*, 420 U.S. 972, 95 S.Ct. 1392 (1975); *Katz v. School Dist. of Clayton, Mo.*, 14 EPD ¶ 7650 (8th Cir. 1977).

This standard was applied in *Brennan v. Woodbridge School District*, 8 EPD ¶ 9640 (D. Del. 1974). In *Woodbridge* the girls' softball coach was paid $300 under a supplemental contract; the boys' hardball coach was paid $400. In finding a violation of the Equal Pay Act, the court examined the duties of the two coaches, finding that both coaches were responsible for recruitment, supervision, and instruction of their respective teams. Both had to account for equipment and arrange schedules for practice, play, and transportation. Both teams had 16 players, used the same equipment, played under the same rules, and had the same season length. Although the court recognized that certain incidental differences (including but not limited to those mentioned above) may make the jobs different, the two were still equal for equal pay purposes. Both involved the same primary job function (teaching) and required substantially equal skill, effort, and responsibility. Furthermore, the court states that the incidental differences between the two jobs must be ignored unless it is shown that the performance of those differences required extra skill, effort, or responsibility; consumed a significant amount of time of all those whose pay differentials were to be justified; and were of an economic value commensurate with the pay differential. *See also Brennan v. Goose Creek Consolidated Independent School* District, 21 WH Cases 25 (S.D. Tex. 1973), *aff'd*, 519 F.2d 53 (5th Cir. 1975), (school district found to have discriminated against female janitors by paying them less than it paid its male janitors).

§ 86.55 Job Classification And Structure

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems or similar jobs, position descriptions, or job requirements which classify persons on the bases of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.51.

DISCUSSION

Section 86.55 prohibits a recipient from classifying jobs as being for males or for females and from maintaining or establishing separate lines of progression, seniority lists, career ladders, or tenure system based on sex. Subpart (c) provides, however, that if sex is a bona fide occupational qualification for the position in question (as that term is defined in section 86.61 [the reference to section 86.51 obviously is a typographical error]), a recipient may classify employees on the basis of sex.

A recipient need not label jobs as being for males or females to be found to have classified the jobs on the basis of sex. It is sufficient if there is an identifiable job category that can be shown to have been limited to one sex. *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp 763 (D.D.C. 1973), *aff'd*, 13 FEP Cases 1068 (D.C. Cir. 1976), *cert. denied*, 16 FEP Cases 998 (1978).

When jobs have been so labeled or classified, however, courts have been quick to find violations of Title VII. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (Title VII violated by employer who refused to permit females to compete for jobs requiring the lifting of 35 pounds or more); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (N.D. Ohio 1971), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972) (the denial of overtime work assignments to females violates Title VII). Similar results have been reached as to seniority, *Palmer v. General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1975) (seniority system that freezes women into formerly all-female jobs violates Title VII); lines of progression, EEOC Decision No. 71–865 (1970), CCH EEOC Decisions ¶ 6190; and systems of promotion, *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973) (reliance on state law is no justification for sex discrimination in promotions, demotions, and transfers).

§ 86.56 Fringe Benefits

(a) "Fringe Benefits" defined. For purposes of this part, "fringe benefits" means: any medical hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 86.54.

(b) Prohibitions. A Recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

DISCUSSION

Section 86.56 relates to the policies of recipients concerning fringe benefits. Subpart (a) defines benefits to include any benefit or service of employment other than wages or salaries. Included are medical, hospital, accident, life insurance, retirement, profit-sharing, and leave plans.

Subpart 86.56(b)(1) prohibits recipients from making fringe benefits available to employees or dependents of employees (including spouses and family members) differently on the basis of sex. Thus, a recipient cannot make family-plan coverage available to male married employees, but deny such coverage to female married employees.

Subpart (b)(2) provides further that as to those fringe benefits which are provided, recipients must make certain that the plans provide for either equal periodic benefits for members of each sex or for equal contributions to the plan by such recipient for members of each sex. Thus under this provision, recipients are free to decide which alternative to adopt. The inquiry must not stop there, however. The question of equality in fringe benefit plans has been considered by other government agencies.

Under Executive Order 11246, either equal periodic benefits or equal contributions will satisfy the requirements of the order. Under the Equal Pay Act of 1963, the Wage and Hour Division of the Department of Labor has concluded that when providing benefits for employees, an employer can comply with the law by making equal contributions (even though the resulting benefits are different) or by making differing contributions to provide equal benefits. The Equal Employment Opportunity Commission, however, in interpreting Title VII, has concluded that Title VII is violated where a benefit plan provides unequal benefits to employees, even if employer contributions are equal.

In *Manhart v. City of Los Angeles*, 553 F.2d 581, 592 (9th Cir. 1976), the Ninth Circuit was presented with the question of whether a retirement plan that required women employees to contribute from their wages 15% more than similarly situated male employees because of the longer average life expectancy of women violated Title VII. Under the plan offered by the city, women and men received the same monthly benefits on retiring. In declaring the city's policy to be violative of Title VII, the court rejected the argument that the difference in benefits was justified because of the statistically longer life spans of women.

> It is undisputed that the overriding purpose of Title VII is to require employers to treat each employee (or prospective employee) as an individual, and to make job related decisions about each employee on the bases of relevant individual characteristics, so that the employee's membership in a . . . sexual group is irrelevant to the decisions . . . . To require every individual women to contribute 15% more into the retirement fund than her male counterpart must contribute because women 'on the average' live longer than men is just the kind of abstract generalization, applied to individual women because of their being women, which Title VII was designed to abolish. Not all women live longer than all men, yet each individual woman is required to contribute more, not because she as an individual will live longer, but because the members of her sexual group, on the average, live longer.

Manhart v. City of Los Angeles, 553 F.2d at 585.

The court not only enjoined the city from continuing to charge the higher rate to its female employees, but also awarded a refund of all excess contributions made on or after April 5, 1972. On rehearing, following the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401 (1977), the Ninth Circuit reaffirmed its decision in *Manhart*, 553 F.2d at 592, stating that unlike in *Gilbert*, here the Court was faced with discrimination in a pension plan that is based on sex in that its basis is the presumed characteristic of women as a group—longevity—while it disregards every factor other than sex that is known to affect longevity.

The Supreme Court, although altering the relief awarded to the plaintiffs, affirmed this decision. *City of Los Angeles v. Manhart*, ——U.S.——, 98 S.Ct. 1370 (1978). Writing for the Court, Justice Stevens recognized that this case was different from others the Court had considered in the past.

> Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. This case does not, however, involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true: women, as a class, do live longer than men. . . . It is equally true, however, that all individuals in the respective classes do not share the characteristic which differentiates the average class representatives. Many woment do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of discrimination is to be determined by comparison of class characteristics or individual characteristics.

City of Los Angeles v. Manhart, 98 S.Ct. at 1375. However, despite this difference, the mandate of Title VII is clear.

"It precludes treatment of individuals as simply components of a . . . sexual . . . class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *City of Los Angeles v. Manhart*, 98 S.Ct. at 1375.

This concept was seen by the Court to be critical, because there could be no assurance that any individual woman would live longer than any individual male. In fact, many of the females would not live as long as the average man. As a consequence, while working, women would receive smaller paychecks than men because of their sex, but would receive no compensating advantage when they retired. As a result, the Court held that "[a]n employment practice which requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with [Title VII]." *City of Los Angeles v. Manhart*, 98 S.Ct. at 1377.

Thus, as in many other areas, recipients must look not only to the regulation under Title IX, but must also examine the regulations of other federal and state agencies to determine if their fringe benefit policies comply with the law.

Subpart 86.56(b)(3) provides that recipients shall not offer their employees a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex, or which otherwise discriminates in benefits on the basis of sex. This requirement is consistent with the cases decided under Title VII that have held that the forced retirement of women at an earlier age than men violates Title VII. *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973); *Bartmess v. Drewrys U.S.A., Inc*, 444 F.2d 1186 (7th Cir. 1971).

Similarly, in *Reilly v. Robertson*, 360 N.E. 2d 171, 13 EPD ¶11,626 (Indiana Sup. Ct. 1977), *cert. denied*, 98 S.Ct. 73 (1977), the Supreme Court of Indiana concluded that the Indiana State Teachers' Retirement Fund violated the Indiana Constitution (and the Fourteenth Amendment) by using sex-segregated mortality tables, resulting in the payment of differential retirement benefits to male and female retired teachers. The Fund argued that, because women live longer than men, they will collect benefits for a longer time. Therefore, to equalize this disparity, the fund must grant to males higher monthly benefits. Thus, on the average, each person will have received the same total amount in benefits.

The court, however rejected this argument as contrary to the legislative purpose of the fund and further noted that the fund classified recipients on the basis of their sex, but ignored innumerable factors that influence life expectancy. The court referred to the evidence presented, which established

> that 82.9% of females will have the same year of death as 82.9% of the males and as a consequence those females will die having received less than those males; and that the additional income given retired males monthly will permit them to live in retirement more comfortably than retired females.

13 EPD at p. 7342.

In holding the scheme to be unconstitutional, the court concluded that "the monthly annuity payments are intended to be perceived by potential beneficiaries as provided satisfaction of short-term daily needs arising during retirement. By providing greater payments to men, the Appellant Fund has provided men with a greater panoply against risks arising from daily human needs. No difference in those risks as between men and women exists, justifying the additional protection afforded men." 13 EPD at p. 7345. (In a separate concurring opinion, Justice Arterburn noted that the fund had failed to prove that, in the teaching profession, females have a longer life span than males: "We are dealing in this case solely with the teaching profession. I am inclined to believe that the stresses, strains and hazards of that profession apply alike to the male and female teacher. Until there is evidence to the contrary, I must conclude the mortality rate is the same." 13 EPD at p. 7346.)

§ 86.57 Marital Or Parental Status

(a) General. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) Pregnancy. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) Pregnancy as a temporary disability. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) Pregnancy leave. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

DISCUSSION

Section 86.57 contains the provisions of the regulation relating to recipient policies concerning the marital or parental status of employees. In general, recipients are prohibited from applying any policy or taking any employment action concerning the potential marital, parental, or family status of an employee that treats persons differently on the basis of sex, or that is based on whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit. This provision parallels to some degree section 86.40(a) relating to the rights of students. Thus, the legal considerations relevant when analyzing the rights of students will also be relevant when analyzing the rights of employees and applicants for employment.

Furthermore, the regulation may prohibit the application of policies that may seem nondiscriminatory. In *Andrews v. Drew Municipal Separate School District,* 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted* ___ U.S. ___, 96 S.Ct. 1752 (1976), two unwed mothers challenged the constitutionality of a school district rule that prohibited the employment of unwed parents. The school district argued that the policy was necessary to create a properly moral scholastic environment because (1) unwed parenthood is prima facie proof of immorality; (2) unwed parents are improper communal role models, after whom students may pattern their lives; and (3) the employment of an unwed parent in a scholastic environment materially contributes to the problem of schoolgirl pregnancies.

The court held that the first rationale put forth by the school district violated the Constitution because the presumed fact—immorality—did not necessarily follow from the proven fact of unwed parenthood. Furthermore, the court concluded that there were reasonable alternatives by which the district could remove or suspend teachers engaging in immoral conduct.

The second rationale was also found to be lacking. The court noted that there was no evidence that the women involved were proselytizing pupils, but rather the record demonstrated that each woman had taken steps to keep her private life separate from their public life.

Finally, the court concluded that the third rationale was not based on fact, but rather on nothing more than speculation and assertions of opinion.

Although the court of appeals failed to discuss the allegation that the policy amounted to discrimination on the basis of sex, the trial court did examine this claim. The court concluded that the rule created a suspect classification based on sex, noting that

> only unmarried females have been prohibited from employment under the policy; and it is self-evident that the rule can only be applied against them. Although the rule professes to be neutral, proscribing employment of any parent, male or female, of an illegitimate child, the rule cannot operate that way. Unless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement. Nature does not readily, if ever, identify the offspring's sire. A woman, however, is impregnated, gives birth, and often raises the child alone.

Andrews v. Drew Municipal Separate School District, 371 F. Supp. at 35.

Thus, as is the case with students, recipients must consider more than just the Title IX regulations when making employment decisions.

Subpart 86.57(a)(2), which prohibits recipients from making employment decisions on the basis of whether or not the applicant or employee is the head of household or principal wage earner, is the recognition that in some states, the husband is defined as the head of household. Therefore, to allow a recipient to hire on a basis of being the head of household would be to permit hiring on the basis of a characteristic that is the functional equivalent of "sex." Furthermore, as the regulation impliedly recognizes, to permit a recipient to adopt a policy that results in the termination of women employees who marry because of the belief that, on the average, women cannot work effectively and keep an adequate home life, would be to sanction discrimination on the basis of sex. *Cf. Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194 (7th Cir. 1971).

Subparts 86.57(b), (c) and (d) concern themselves with the treatment that may be accorded pregnant employees or applicants for employment.

Under Subpart (b), the regulation takes the position that to classify employees on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom is to classify on the basis of sex. Thus, aside from the constitutional consideration discussed below, the regulation prohibits, on discrimination grounds, the refusal to hire or the discharge of any person on the basis of pregnancy or pregnancy-related conditions.

Subpart (c) is premised on the fact that although pregnancy per se is not a disability, at some time during each pregnancy, disability is inevitable. It is essentially a definitional provision, defining disabilities resulting from pregnancy as a temporary disability. Under this subpart recipients are required to treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as they would treat any other temporary disability for all job-related purposes, including leaves of absence, eligibility for disability income, accrual of seniority while on leave, reinstatement following leave, or any other fringe benefit offered to employees.

Subpart (d) provides that if a recipient does not regularly maintain a leave policy for its employees (or if a particular employee has insufficient leave or accrued employment time to qualify for leave under such a policy), the recipient must treat pregnancy and related disabilities as a justification for a leave of absence without pay for a reasonable period. After such period, the employee on such leave is to be reinstated to the status she held when the leave began or to a comparable position without any decrease in rate of compensation or loss of other benefits, opportunities, or privileges of employment.

The concept of pregnancy discrimination as sex discrimination has its development in both constitutional and statutory case law. Constitutionally, courts had concluded that to impose mandatory leaves of absence on pregnant teachers was to discriminate against them on the basis of their sex. *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972); *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973); *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973). However, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791 (1974), the Supreme Court adopted an alternative view. Before the Court in *LaFleur* were the mandatory maternity leave policies of two separate school systems requiring pregnant teachers to leave their jobs four or five months before childbirth. The schools had contended that the mandatory leaves were necessary to maintain continuity of classroom instruction and because some teachers were physically incapable of adequately performing certain of their duties during the latter stages of pregnancy. The Court disagreed with the schools, concluding that to require a healthy, but pregnant teacher to take a mandatory leave of absence at an arbitrary date during pregnancy (and prohibiting return to employment until three months following the birth of the child), violated the due process rights of teachers in that it created an irrebuttable presumption that was not necessarily true.

Independent of the constitutional considerations mandated by *LaFleur*, courts had concluded that mandatory maternity leaves violated Title VII. In *Singer v. Mahoning County Board of Mental Retardation*, 379 F. Supp. 986 (N.D. Ohio 1974), the court concluded that when a pregnant woman is capable of performing her job adequately, to force maternity leave on her [illegible] discrimination based on a physical condition peculiar to her sex and violative of Title VII. *See also Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir. 1977) *cert. denied* ____ U.S. ____, 97 S.Ct. 2180 (1977).

However, later Supreme Court decisions questioned the scope of this analysis. In *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485 (1974), the Court scrutinized under the Fourteenth Amendment the State of California's policy of not providing insurance under its disability benefits program for women unable to work because of normal pregnancy. In concluding that the program did not violate the Equal Protection Clause, the Court stated, in footnote 20, that

> [w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . Absent a showing that distinctions involving pregnancy are more pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation."

Geduldig v. Aiello, 417 U.S. at 496, n. 20.

This concept was reaffirmed by the Court under Title VII. In *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401 (1977), the Supreme Court, relying on *Geduldig*, ruled that an employer did not violate Title VII by excluding pregnancy from coverage of its disability plan. In so ruling, the Court refused to follow the Equal Employment Opportunity Commission's guideline (similar to Section 86.57), requiring an employer to treat disabilities resulting from pregnancy as temporary disabilities under any health insurance or sick leave plan.

The Court concluded that, even assuming that intent is not necessary to establish a prima facie case of discrimination, the mere exclusion of pregnancy-related disabilities from coverage was not discrimination, even though this underinclusion impacts more heavily on one gender than on another. The Court did, of course, conclude, as it did in *Geduldig*, that if it could be shown that distinctions involving pregnancy were mere pretexts designed to effect an invidious discrimination, it would present a different case.

Despite the *Gilbert* decision, the Office for Civil Rights continued to insist that Title IX and its regulation mandated a different result. In a letter dated January 10, 1977, to Ms. Margaret Dunkle, the Office for Civil Rights reaffirmed its position that section 86.57 would continue to be enforced by the office. It is HEW's position that because the Title IX regulation is substantive in nature and was approved by Congress and the President, it accurately reflects the intent of Congress.[6] *See also* Justice Brennan's dissenting opinion in *Gilbert*, 97 S.Ct. at 419.

Subsequently, in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S.Ct. 347 (1977) the issue was further confused. In *Satty*, the court of appeals had held that the failure to provide sick pay to an employee while on pregnancy leave, which leave was accompanied by a loss of accumulated job seniority, violated Title VII. The Supreme Court in its review separated the issue into two parts: 1) denial of sick pay; and 2) denial of accumulated seniority upon returning to work. Concerning the seniority issue, the Court held that the policy of "depriving employees returning from pregnancy leave of their accumulated seniority acts both to deprive them 'of employment opportunities" and to "adversely affect [their] status as an employee.' " *Nashville Gas Co. v. Satty,* 98 S.Ct. at 350–1. This was held to violate Title VII because employers are not permitted to burden female employees in such a way as to deprive them of employment opportunities because of their biological role.

---

[6] In *Gilbert*, the Supreme Court refused to give great deference to the Equal Employment Opportunity Commission Guideline in question because (1) the Equal Employment Opportunity Commission had not been given the authority to promulgate rules or regulations interpreting Title VII; (2) the guideline was not a contemporaneous interpretation of Title VII since it was promulgated eight years after enactment of Title VII; and (3) the guideline in question was contradictory to the position which the Equal Employment Opportunity Commission had taken at an earlier date. Thus, when measured against the standards of *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944), the guideline received low marks. *See* THE IMPLEMENTING REGULATION, The Authoritativeness of the Regulation.

The sick leave pay issue, however, was considered indistinguishable from that considered in *General Electric v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401 (1976). In holding that the denial of sick pay to pregnant women did not violate Title VII, the Court relied on a "benefit/burden" distinction. "[I]t is difficult to perceive how exclusion of pregnancy from a disability insurance plan or sick leave compensation program 'deprives an individual of employment opportunities' or 'otherwise adversely affects his status as an employee' in violation of [Title VII]. The direct effect of the exclusion is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status." *Nashville Gas Co. v. Satty,* 98 S.Ct. at 352–3.

Following the decision in *Gilbert,* Congress began debates on legislation that was intended to reverse the Court's decision. On October 23, 1978, Congress passed this legislation and amended Title VII. Pursuant to these amendments, the phrases "because of sex" or "on the basis of sex" must be interpreted to include within their meaning because of or on the basis of pregnancy, childbirth, or related medical conditions; women affected by pregnancy, childbirth, or related medical conditions must now be treated the same for all employment related purposes as other persons not so affected but similar in their ability or inability to work.

§ 86.58 Effect Of State Or Local Law Or Other Requirements

(a) Prohibitory requirements. The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) Benefits. A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

DISCUSSION

Section 86.58 restates in the employment sphere the concept contained in section 86.6(b). Subpart 86.58(a) provides that a recipient's obligation to comply with the employment sections of the regulation is not obviated or alleviated by any state or local law that imposes prohibitions or limitations on the employment of members of one sex that are not imposed on members of the other sex. This provision adopts the concept that when federal and state legislation have conflicting requirements, the Constitution requires that the federal act takes precedence. In the area of civil rights, this principle has withstood thorough consideration in those cases arising under Title VII that involve state "protective laws" that restricted the employment opportunities of women. Uniformly, the courts have concluded that in such instances, the state laws have been supplanted by Title VII and are of no further force or effect. *Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219 (9th Cir. 1971); *Manning v. General Motors Corp.,* 466 F.2d 812 (6th Cir. 1972), *cert. denied,* 410 U.S 946 (1973).

Subpart 86.58(b) further provides that if any state or local law provides any compensation, service, or benefit to members of one sex only, then a recipient must extend that benefit to the formerly excluded sex to comply with Title IX, rather than denying the benefit to the specifically covered sex.

§ 86.59 Advertising

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

DISCUSSION

Section 86.59 prohibits a recipient from including in any advertisement relating to employment any preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question. This section, imposing on recipients certain limitations concerning their recruitment practices, finds its genesis to some degree in the case of *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 379, 93 S.Ct. 2553 (1973). In *Pittsburgh Press,* the Court held that a Pittsburgh ordinance prohibiting newspapers from carrying sex-designated advertising columns did not violate the newspaper's First Amendment rights, because the regulation of the want ads was incidental to and co-extensive with the regulation of employment discrimination.

As a consequence, unless a particular job is subject to limitations due to the application of the bona fide occupational qualification concept, all advertising relating to the job must be free of bias. See section 86.61 for a discussion of the bona fide occupational qualification exception.

§ 86.60 Pre-employment Inquiries

(a) Marital status. A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) Sex. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

DISCUSSION

Section 86.60 applies the principles contained in section 86.21(c)(4), relating to the rights of students, to applicants for employment. Recipients are prohibited from making any preemployment inquiry as to the marital status of an applicant for employment. Therefore, requesting that applicants designate on their application Mr., Ms., Miss, or Mrs. will result in a violation of this section.

Subpart 86.60(b) further provides that if a recipient makes a preemployment inquiry as to the sex of an applicant for employment, such inquiry must be made equally of applicants of both sexes and that information must not be used in connection with discrimination that is prohibited by the regulation.

§ 86.61 Sex As A Bona-fide Occupational Qualification

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

DISCUSSION

Section 86.61 permits a recipient to take action as to employees otherwise prohibited by the regulation if sex is a bona fide occupational qualification (BFOQ) for that action such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. This section was intended to make Title IX consistent with Title VII. Title VII provides that an employer can *hire and employ* employees on the basis of sex if sex is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise. Title 42 U.S.C. § 2000e–2(e). This BFOQ exception has received substantial interpretation. Both the Equal Employment Opportunity Commission and the courts agreed that this exception must be narrowly construed. In its guidelines, the Equal Employment Opportunity Commission concluded that the exception is not applicable where the refusal to hire women is based on assumptions of the comparative employment characteristics of women in general, a stereotyped characterization of the sexes, or because of the preferences of co-workers, employers, clients, or customers. Rather, individuals must be considered on the basis of individual capacities, not on the basis of characteristics generally attributed to the group. Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. Section 1601.1(a).

Courts have taken a similar approach. In *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969), the Fifth Circuit held that the test of whether a BFOQ exists is whether there is "reasonable cause to believe, that is, a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

Furthermore, "[s]exual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception." *Long v. Sapp*, 502 F.2d 34 (5th Cir. 1974). Thus refusing to employ women in jobs involving strenuous lifting, *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), or where co-workers were antagonistic to working with women, *Long v. Sapp*, 502 F.2d 34 (5th Cir. 1969), did not justify application of the BFOQ exception.

Applying this narrow exception to the facts presented in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720 (1977), the Supreme Court has held that being male is a bona fide occupational qualification for the job of correctional counselor in "contact" positions in the Alabama male maximum-security penitentiary. In so holding, the Court was quick to point out that the conditions in the Alabama prison system have been found to be constitutionally intolerable and characterized by rampant violence and a jungle atmosphere. Thus the opinion's precedential value is limited to the unique fact situation found to exist in Alabama. *Dothard v. Rawlinson*, 97 S.Ct. at 2729. Thus,

> [i]n a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians. . . . The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault, but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

Dothard v. Rawlinson, 97 S.Ct. at 2730. In a partial dissent, Justice Marshall, joined by Justice Brennan, made clear that the Court's decision "was impelled by the shockingly inhuman conditions in the Alabama prisons" and that the narrow BFOQ exception will not be allowed to "swallow the rule" against sex discrimination. *Dothard v. Rawlinson*, 97 S.Ct. at 2735 (Marshall, J. concurring in part and dissenting in part).

Section 86.61 further provides, however, that a recipient may consider an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex. This exception is in keeping with prevalent standards of morality and decency. Thus, when one's job is that of restroom attendant, the employer can make assignments on the basis of sex, *Corn Products Co. International, Inc., & Atomic Workers, Local 7-662*, Jerome Gross, Arbitrator. (Jan. 9, 1970), 70–1, Lab Arb. ¶ 843g (1970). Yet sex is not a BFOQ for the job of lifeguard at a hotel swimming pool where, as part of the job, the lifeguard cleans both the men's and women's locker rooms. EEOC Decision No. 70–286 (Nov. 18, 1968) CCH EEOC Decisions, ¶ 6077 (1973).

Subpart F – Interim Procedures

Subpart F merely adopts for Title IX purposes the procedures applicable to Title VI proceedings during the interim period between the effective date of regulation and the effectiveness of a final consolidated procedural regulation to simplify the enforcement responsibilities of HEW.

§ 86.71 Interim Procedures

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to Title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 C.F.R. §§ 80-6—80-11 and 45 C.F.R. Part 81.

DISCUSSION

Section 86.71 incorporates, as interim procedures, the procedural regulations applicable to Title VI. Under these regulations, an individual wishing to complain of allegedly discriminatory practices must do so in writing, setting forth the individual's name and address, the recipient's name, the date of the alleged violation, and the basis of the complaint.

Of major concern under Title IX was the question of whether or not a private individual can pursue his or her Title IX rights independently in court, or whether the administrative procedure provided by HEW is the only course available to aggrieved individuals. That question was answered in *Cannon v. University of Chicago,* 559 F.2d 1063 (7th Cir. 1977), *rev'd,* ____ U.S. ____ 99 S.Ct. 1946 (1979), the first case to confront that issue. In the first opinion of the court of appeals in *Cannon,* the Seventh Circuit held that Title IX does not provide for a private right of action against a recipient. Although HEW had unequivocally stated that such a private right was meant to exist, the court found more compelling the fact that nowhere in the legislative history did Congress indicate an intention to create such a right.

In its opinion on rehearing in *Cannon,* however, the court of appeals modified this approach to some degree. Although still concluding that Title IX did not create, by implication, a private judicial remedy for Ms. Cannon, the court hinted that this outcome did not necessarily foreclose the question. "Were we confronted with an alleged violation of a fundamental federal constitutional or statutory right for which Congress has provided no remedy at all, or for which the remedies available have proven to be wholly inadequate to the task of protecting these rights, we might take a different view of the matter." *Cannon v. University of Chicago,* 559 F.2d at 1082 (7th Cir. 1977). The court further indicated that had Ms. Cannon been able to invoke the federal court's jurisdiction to enforce a claim independent of Title IX (for example, a federal constitutional claim), her action could have included a claim of the violation of Title IX. *Cannon v. University of Chicago,* 559 F.2d at 1083 (7th Cir. 1977).

The Supreme Court, however, reversed this decision, finding the existence of a private right to sue. The Court found that Title IX was enacted so as "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Cannon v. University of Chicago,* 99 S.Ct. at 1961. That being the case, the Court held that "it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself . . . the burden of demonstrating that an institution's practices are so prevasively discriminatory that a complete cut-off of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute." *Cannon v. University of Chicago,* 99 S.Ct. at 1962.

APPENDIX A

45 C.F.R., PART 106[1] – Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance

---

[1] This appendix contains the regulation to implement Title IX of the Education Amendments of 1972 as republished in 1980 as 45 C.F.R., Part 106. The regulation was originally published in 1975 as 45 C.F.R., Part 86, and it is the section numbers as they appeared in Part 86 which are utilized throughout the body of this *Handbook*. § 106.1 in the republished regulation corresponds to the original § 86.1.

federal register

Friday
May 9, 1980

Part II

Department of Education

Establishment of Title 34

TITLE IX
EDUCATION AMENDMENTS OF 1972

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

Sec.

106.1 Purpose and effective date.
106.2 Definitions.
106.3 Remedial and affirmative action and self-evaluation.
106.4 Assurance required.
106.5 Transfers of property.
106.6 Effect of other requirements.
106.7 Effect of employment opportunities.

Sec.

106.8 Designation of responsible employee and adoption of grievance procedures.
106.9 Dissemination of policy.

Subpart B—Coverage

106.11 Application.
106.12 Educational institutions controlled by religious organizations.
106.13 Military and merchant marine educational institutions.
106.14 Membership practices of certain organizations.
106.15 Admissions.
106.16 Educational institutions eligible to submit transition plans.
106.17 Transition plans.
106.18–106.20 [Reserved].

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

106.21 Admission.
106.22 Preference in admission.
106.23 Recruitment.
106.24–106.30 [Reserved].

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

106.31 Education programs and activities.
106.32 Housing.
106.33 Comparable facilities.
106.34 Access to course offerings.
106.35 Access to schools operated by L.E.A.s.
106.36 Counseling and use of appraisal and counseling materials.
106.37 Financial assistance.
106.38 Employment assistance to students.
106.39 Health and insurance benefits and services.
106.40 Marital or parental status.
106.41 Athletics.
106.42 Textbooks and curricular material.
106.43–106.50 [Reserved].

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

106.51 Employment.
106.52 Employment criteria.
106.53 Recruitment.
106.54 Compensation.
106.55 Job classification and structure.
106.56 Fringe benefits.
106.57 Marital or parental status.
106.58 Effect of State or local law or other requirements.
106.59 Advertising.
106.60 Pre-employment inquiries.
106.61 Sex as bona-fide occupational qualification.
106.62–106.70 [Reserved].

Subpart F—Procedures [Interim]

106.71 Interim procedures.
Subject Index to Title IX Preamble and Regulation

BEST COPY AVAILABLE

Appendix A—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs.

Subpart A—Introduction

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93–568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93–380)

§ 106.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1688.

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Education.

(d) *"Assistant Secretary"* means the Assistant Secretary for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under

BEST COPY AVAILABLE

which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c) (ii) of this section and of any remedial steps taken pursuant to paragraph (c) (iii) of this section.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part.

BEST COPY AVAILABLE

The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a) (1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 106.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts; the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93–568, 88 Stat. 1882 amending Sec. 901)

§ 106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 86.16 and 86.17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

BEST COPY AVAILABLE

§ 106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the Secretary as described in § 106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.17 Transition plans.

(a) *Submission of plans.* An institution to which § 106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 106.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 106.18–106.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admision, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or

BEST COPY AVAILABLE

entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 106.24–106.30 [Reserved]

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 106.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives of benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 106.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective

BEST COPY AVAILABLE

standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.35 Access to schools operated by L.E.A.s.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate

BEST COPY AVAILABLE

Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.43-106.50 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way

BEST COPY AVAILABLE

which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave,

BEST COPY AVAILABLE

payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 106.62–106.70 [Reserved]

Subpart F—Procedures [Interim]

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6–100.11 and 34 CFR Part 101.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subject Index to Title IX Preamble and Regulation

A

Access to Course Offerings [43, 55, 56, 57, 58], 106.34
Access to Schools Operated by LEA's, [44]: 106.35
Admissions, [5, 6, 30]: 106.15, 106.21
  Affirmative and remedial action, [16, 17, 24]: 106.3(a): (b)
  Administratively separate units, [30]: 106.15(b) 106.2(o)
  Educational Institutions, [30], 106.15(d), 106.2(n)
  General, 106.21(a), 106.2(p),
  Prohibitions relating to marital and parental status, [32, 38]: 106.21(c)
  Professional schools, [30], 106.2(m)
  Public institutions of undergraduate higher education, 106.15(e)
  Recruitment, [34, 35]: 106.23
  Specific prohibitions, 106.21(b)
  Tests, [31]: 106.21(b) (2)
  Preference in admission, [35]: 106.22
Advertising, 106.59
Affirmative Action, see "Remedial and Affirmative Actions"
Assistance to "outside" discriminatory organizations, [40, 53]: 106.31(b) (7), (c)
Assurances, [18]: 106.4
  Duration of obligation, 106.4(b)
  Form, 106.4(c)
Athletics, [69 to 78]: 106.41
  Adjustment period, [78]: 106.41(d)
  Contact sport defined, 106.41(d)
  Equal opportunity, [76, 77]: 106.41(d)
  Determining factors, 106.41(c) (i) to (x)
  Equipment, 106.41(c)
  Expenditures, 106.41(c)
  Facilities, 106.41(c)
  Travel, 106.41(c)
  Scholarships, [64, 65]: 106.37(d)
  General, [69, 70, 71, 72, 73, 74, 75]: 106.41(a)
  Separate teams, [75]: 106.41(b)

B

BFOQ, [96]: 106.61

C

Comparable facilities
  Housing, [42, 54]: 106.32
  Other, 106.33, 106.35(b)
Compensation, [84, 87, 92]: 106.54
Counseling
  Disproportionate classes, [45, 59]: 106.36(c)
  General, [45, 59]: 106.36(a)
  Materials, [45, 59]: 106.36(b)
Course Offerings
  Adjustment period, [55]: 106.34(a) (i)
  General, [7, 43]: 106.34
  Music classes, [43]: 106.34(f)
  Physical education [43, 56, 58];
  Sex education, [43, 57]: 106.34(e)
Coverage, [5]; 106.11 to 106.17
  Exemptions
Curricular materials, [52]: 106.42(a)

D

Definitions, [14, 15]; 106.2 (a) to (r)
Designation of responsible employee, [20, 22]: 106.8(a), (b)
Dissemination of policy, [21]: 106.9
  Distribution, 106.9(c)
  Notification of policy, [21]: 106.9(a)
  Publications, 106.9(b)
Dress codes 106.31(b) (4)

E

Education Institutions
  Controlled by religious organizations, 106.12
  Application, [28, 29]: 106.12(a)
  Exemption, [26]: 106.12(b)
Education Program and Activities
  Benefiting from Federal financial assistance, [10, 11]: 106.11
  General, [10, 11, 53]: 106.31(a)
  Programs not operated by recipient, [41, 54]: 106.31(c)
  Specific prohibitions, [38, 39, 40, 53]: 106.31 (b)
Effective Date, [3]
  Employee responsible for Title IX, see "Designation of Responsible Employee"
Employment
  Advertising, 106.59
  Application, 106.51(b)
  Compensation, [84, 92]: 106.54
  Employment criteria, 106.52
  Fringe benefits, [88, 89]: 106.56
  General, [81, 82, 87]: 106.51

---

*Preamble paragraph numbers are in brackets [ ].

BEST COPY AVAILABLE

  Job Classification and Structure, 106.55
  Marital and Parental Status, 106.57
  Pregnancy, [85, 93]: 106.57(b)
  Pregnancy as Temporary Disability, [85, 93]: 106.57(c)
  Pregnancy Leave, [85, 93, 94]: 106.57(d)
Pre-Employment Inquiry
  Recruitment, [83, 90, 91, 95]
  Sex as a BFOQ, [96]: 106.61
  Student Employment, [66]: 106.38
  Tenure, 106.51(b) (2)
Exemptions, [3, 27, 28, 29, 30, 53]: 106.12(b), 106.13, 106.14, 106.15(a), 106.15(d), 106.16

F

Federal Financial Assistance, 106.2(a)
Financial Assistance to students, [46, 60, 61]: 106.37
  Athletic Scholarships, [46, 64, 65]: 106.37(d)
  Foreign institutions, study at [63]: 106.31(c)
  General, 106.37
  Non-need scholarships, [62]: 106.37(b)
  Pooling of sex-restrictive, [46, 61, 62]: 106.37(b)
  Sex-restrictive assistance through foreign or domestic wills [46, 61, 62]: 106.37(b)
Foreign Scholarships, see "Financial assistance" 106.37 and "Assistance to 'outside' discriminatory organizations" 106.31(c)
Fraternities/Sororities
  Social, [53, 27, 28]: 106.14(a)
  Business/professional, [40, 53, 27, 28]: 106.31 (b) (7)
  Honor societies, [40, 53]: 106.31(b) (7)
Fringe benefits, [67, 88, 89]: 106.56, 106.39
  Part-time employees, [89]

G

Grievance Procedure, see "Designation of responsible employee", 106.8(a), (b)

H

Health and Insurance Benefits and Services, [67, 88, 93]: 106.39, 106.56
Honor societies, [40, 53]: 106.31(b) (7)
Housing, 106.32
  Generally, [42]: 106.32(b)
  Provided by recipient, 106.32(b)
  Other housing, [54]: 106.32(c)

J

Job Classification and Structure, 106.55

L

LEA's, [44]: 106.35

M

Marital and Parental Status
  Employment
  General, [85, 93, 94]: 106.57
  Pregnancy, [85, 93, 94]: 106.57(b)
  Pregnancy as a temporary disability, [85, 93, 94]: 106.57(c)
  Pregnancy leave, [85, 93, 94]: 106.57(d)
  Students
  General, [49]: 106.40(a), (b)
  Pregnancy and related conditions, [50]: 106.40(b) (1) (2) (3) (4) (5)
  Class participation, [50]: 106.40(b) (1)
  Physician certification, [50]: 106.40(b) (2)
  Special classes, [50]: 106.40(b) (3)
  Temporary leave, [50]: 106.40(b) (4), (5)
Membership Practices of Social fraternities and sororities, [27, 28, 53]: 106.14(a)
  Voluntary youth service organizations, [27, 28, 53]: 106.14(c)
  YMCA, YWCA and others, [27, 28, 53]: 106.14(b)
Military and Merchant Marine Educational Institutions, [29]: 106.13

P

Pooling, see "Financial Assistance", 106.37
Pre-employment Inquiries
  Marital status, [86, 95]: 106.60(a)
  Sex, 106.60(b)
Preference in Admissions, [35]: 106.22
  See also "Remedial and Affirmative Action"
Pregnancy, Employment
  General, [85, 93, 94]: 106.57
  Pregnancy, [85, 93, 94]: 106.57(b)
  Pregnancy as temporary disability, [85, 93, 94]: 106.57(c)
  Pregnancy leave, [85, 93, 94]: 106.57(d)
  Students
  General, [49, 50]: 106.40 (a) and (b)
  Pregnancy and related conditions; [50]: 106.40(b) (1) to (5)
  Class Participation, [50, 55, 58]: 106.40(b) (1)
  Physical certification, [50]: 106.40(b) (2)
  Special class, [50]: 106.40 (b) (3)
  Temporary leave, [50]: 106.40(b) (4), (5)
Private Undergraduate Professional Schools, [30]: 106.15(d)
Purpose of Regulation, [13]: 106.1

R

Real Property, 106.2(g)
Recruitment
  Employment
  Nondiscrimination, [83, 91]: 106.53(a)
  Patterns, 106.53(b)
Student
  Nondiscrimination, [34, 35]: 106.23(a)
  Recruitment at certain institutions, 106.23 (b)
Religious Organizations
  Application, [29, 28]: 106.12(a)
  Exemption, [28]: 106.12(b)
Remedial and Affirmative Actions, [16, 17, 24]: 106.3

S

Scholarships, see "Financial Assistance", 106.37
Self-evaluation, [16, 22]: 106.3(c), (d)
Surplus Property (see Transfer of Property 106.5)
  Duration of obligation 106.4(b)
  Real Property 106.4(b) (1)

T

Textbooks and curricular materials, [52, 79, 80]: 106.42
Termination of funds, [10, 11]
Transfer of property, 106.5
Transition Plans
  Content of plans, 106.17(b)
  Different from Adjustment period, [78]: 106.41(d)
Submission of plans, 106.17(a)

Appendix A—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

Note.—For the text of these guidelines, see 34 CFR Part 100, Appendix B
[44 FR 17168, Mar. 21, 1979]

[FR Doc. 80-13630 Filed 5-8-80; 8:45 am]

BILLING CODE 4110-02-M

APPENDIX B

The System of Legal References and Citations

The court system in the United States comprises federal, state, and local courts. The federal courts operate on a three-tiered system: a lower, trial-court level; an intermediate appellate level, at which decisions of the lower courts can be reviewed; and a higher level appellate court that can render final decisions binding on the other two levels of courts. Most states have similar tiered court systems. They operate on basically the same system as the federal courts, with a trial-court level and one or two appellate-court levels. Local court systems usually consist of only the trial-court level.

Because Title IX and other federal civil rights acts are enforced primarily in the federal system, this work concentrates on the decisions of the federal courts. For the reader to understand the various precedential values of the cases cited in this work, it is important to understand the federal legal system.

The United States is divided into small geographic areas called districts. In each district are the trial courts of the federal system—the United States district courts. This is the lowest level of the federal court system. Decisions of these courts are binding precedent within the district where the opinion issues. Recent decisions of these courts are published in volumes of books called the Federal Supplement, abbreviated as F. Supp.

Appeals from the various district courts are usually taken to the courts of appeals. There are 11 apppellate circuits in the United States. These circuits range in geographical area from the District of Columbia Circuit, which includes only Washington, D.C., to the Ninth Circuit, which covers nine states and one U.S. territory. Decisions of these courts are binding on all district courts within the circuit. Recent decisions of these courts are published in the volumes of books called Federal Reporter, abbreviated as F., and the Federal Reporter Second Series, abbreviated as F.2d.

The Supreme Court of the United States is the highest court in the land. Although it does act as a trial court in a limited class of cases, the bulk of the Court's work consists of reviewing decisions of lower federal and state courts. The Supreme Court's jurisdiction is discretionary to a great degree and gives the Court the right to decide which cases it will hear and which it will not.

Almost all cases that eventually reach the Supreme Court do so through petitions for certiorari (petitions, in effect, for the Court to order a lower court to certify the record to it for review). Although some cases, by their specialized nature, have a "right" to be heard by the Supreme Court on appeal such "appeals as of right" have been sharply limited since 1925. The justices of the Court have discretionary power to grant or deny petitions for certiorari. The majority of cases are actually disposed of when the Court simply denies the petition (noted in a citation by the abbreviation *cert. denied),* thus refusing to review the case. The effect of this denial is to leave the lower court opinion intact. This decision, however, does not necessarily mean that the Court agrees with that decision. In fact, the justices will not even consider a petition unless at least one of them believes it is important enough, and no case will be accepted for review unless at least four justices believe that the case merits review.

Decisions of the Supreme Court are binding on all federal, state, and local courts. The official volumes of books reporting decisions of the United States Supreme Court are called the United States Reports (abbreviated as U.S.).

Decisions of some states courts often can be found in regional reporters. Each regional reporter contains decisions of courts in more than one state. The regional reporters are: *Pacific Reporter* (abbreviated as P. and P.2d), Northwester Reporter (abbreviated as N.W., and N.W. 2d), Southwestern Reporter (S.W., and S.W. 2d), Northeastern Reporter (N.E., and N.E. 2d), Atlantic Reporter (A., and A. 2d), Southeastern Reporter (S.E., and S.E. 2d), and Southern Reporter (So. and So. 2d).

Citation to Cases

Cases and legal writings are indexed according to a uniform system of citation. By correctly interpreting the citation, one is able to gain descriptive data about the case or writing as well as determining how to find the items in a law library. Example: *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251 (1971).

Unless in a footnote, the name of the case is underlined (or found in italics).

After the name is the official citation, 404 U.S. 71. The first number, 404, refers to the volume number in a particular set of books. The abbreviation after the volume number refers to the set of books in which the case can be found. Here, U.S. refers to United States Reports, the reporter that contains the official reports of decisions of the United States Supreme Court. The number after the abbreviation refers to the page number in the particular volume on which the decision begins. Thus, the cite to *Reed v. Reed* refers you to page 71 of volume 404 of the United States Reports.

After this reference is the citation to an alternative place where the opinion can be found. In this instance, the reference is to volume 92 of the Supreme Court Reporter at page 251.

At the end of the citation, in parenthesis, appears the year in which the case was decided by the Court. Decisions by United States Court of Appeals (circuit courts) are cited like this: *Berkelman v. San Francisco United School District,* 501 F.2d 1264 (9th Cir. 1974). This tells you the name of the case (underlined), that the decision can be found in volume 501 of the Federal Reporter, Second Series, and that it would begin on page 1264 in that volume. After, in parentheses, is the name of the circuit (here, it is the Ninth Circuit) and the year the case was decided by that particular circuit court (1974).

When a citation is given to a United States District Court decision, the name of the district is usually listed in parentheses. Thus, *Kirstein v. Rector and Visitors of University of Virginia,* 309 F. Supp. 184 (D. Va. 1970), would tell you on what page and in which volume of the Federal Supplement this decision can be found, and that the case was decided in 1970 by the United States District Court for the District of Virginia.

When a quote is taken directly from a decision, or a case is being cited for a particular point of law, the citation may refer you to a particular page number within that decision. Thus, a quote, followed by the citation *Yick Wo v. Hopkins,* 118 U.S. 356, 374 (1886) would tell you that the decision begins on page 356, but the quotation being used was taken from within the decision on page 374. If the full citation had been previously given in the same memo or brief, the quote might be cited like this: 118 U.S. at 374 or sometimes as *Yick Wo* at 374.

Often in a citation part of the case's history is included. There are several standard abbreviations that are normally used to indicate action taken by one of the courts in a prior proceeding.

Example: *Cape v. Tennessee Secondary School Athletics Association*, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd*, 563 F.2d 793 (6th Cir. 1977).

Here, the abbreviation *rev'd* means reversed. In other words, the decision of the Sixth Circuit Court of Appeals reported at page 793 of volume 563 of the Federal Reporter, Second Series reversed the decision of the district court reported at page 732 of volume 424 of the Federal Supplement.

Following are some of the more common abbreviations and phrases used in case citations and their meaning:

aff'd—affirmed: A judgment or order was rendered by an appellate court declaring that the decision of the lower court is right and must stand as rendered by that lower court.

rev'd—reversed: A judgment or order is rendered by an appellate court which vacates or sets aside the decision of a lower court because of some error or irregularity by that lower court.

modify: An action by an appellate court which alters the ruling of the lower court. This can serve to enlarge or extend the ruling, limit or reduce it, or may just change the ruling in some incidental manner.

cert. denied–Certiorari denied: Discretionary action by an appellate court (used most often in connection with the Supreme Court) which denies a petition by a party to have the court obtain information from the lower court and review the original decision.

rem'd—remanded: An action taken by an appellate court to send a case back to the court out of which it came, for the purpose of having some action on it there. Often, the appellate court will decide the case, then remand it to the lower court, directing it to formulate a remedy that will be consistent with the appellate court's decision.

CITATION TO STATUTES

Laws passed by the U.S. Congress make up the United States Code. The U.S. Code is divided into 50 parts, called titles, each dealing with a specific area of law. When a citation is given to a federal statute, the title number is given first, then the name of the books containing the law, then the section number within that title where the particular law may be found. This section number may include one or several numbers or letters in parenthesis, which may lead you to a specific part of the particular law being cited. Thus, 20 U.S.C. § 1618(a)(2), would lead you to Title 20 of the United States Code, then to section 1681 of that Title, then to part (a)(2) of that section.

CITATION TO ADMINISTRATIVE REGULATIONS

Administrative agencies of the federal government usually issue rules relating to their specific area of responsibility. Such rules, called regulations, are compiled in a set of paperbound volumes called the Code of Federal Regulations (abbreviated as CFR). The CFR is divided into 50 titles, which represent broad areas subject to regulation by federal agencies. Each title is further divided into parts and sections. Regulations issued by the Department of Labor concerning Executive Order 11246 are found in 41 CFR. Regulations issued by HEW concerning Title VI, Title IX, and the Public Health Services Act are found in 45 CFR.

When a regulation is cited, the title number is given first, then the abbreviation for the Code, then the section number of the regulation. (Example: 45 CFR 86.41). The section number is actually the number of the part (here, 86) followed by a decimal point and another number that helps to locate the correct section.